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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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ZELMA FELLNER, *et al.*,  
*Cross-Petitioners*,  
v.  
BARBARA JEAN BERRY, *et al.*,  
*Respondents*.

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**CROSS-PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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## QUESTIONS PRESENTED

### I.

Whether the courts below exceeded constitutional limits and erred when they took and confirmed injunctive action having the effect of nullifying a decision by the State Board of Education transferring territory from one school district to another when both local and state school boards, in carrying out duties imposed by state statute, had determined that such transfers were educationally desirable and there was no competent evidence of a racially-motivated effect or purpose for the transfer.

### II.

Whether the lower courts erred in permanently enjoining all future school territory transfers or student transfers from the Sodus II area except for the sole purpose of decreasing racial segregation



in each school system when state law provides for such transfers to alleviate cases of hardship and to provide flexibility in the providing for educational services to children residing within the state.



## PARTIES

### Plaintiffs

Barbara Jean, Dennis, Julius, Jamie Carl, Mildred, Stamford, and Vince Berry, minors, by Mrs. Ruth Berry, their parent and next friend, et al., on behalf of a plaintiff class composed of all present and future students of the Benton Harbor Area School District.

### Defendants

School District of the City of Benton Harbor; the Benton Harbor Area School District; members of the Benton Harbor School Board; Superintendent of the Benton Harbor School Board; Michigan State Board of Education; Superintendent of the Michigan Department of Education; John W. Porter, former Superintendent of Public Education of the Michigan State Board of Education; Eau Claire School District, and



its Superintendent Donald McAlvey; Coloma Community School District, and its Superintendent William Barrett; William G. Milliken, former Governor of the State of Michigan; Frank J. Kelley, Attorney General of the State of Michigan; Municipal Boundary Commission of the State of Michigan; Berrien County Intermediate School District, and its Superintendent Raymond Sreboth.

#### Intervenors

Zelma Fellner, Victor Fellner, Jean Hahn, Walter Schoenfield, Elizabeth Schoenfield, Earl Dohn, Doris Dohn, John Carlson, Emilie Carlson, Hertice Mills, Janet Mills, Danny Blythe, Almeda Blythe, Kelly Becht, Polly Becht, Fred George, Patricia George, Jerome Krieger, Glenadean Krieger, Jerry Engle, Sally Engle, Tarus Poluhanycz, Judy Poluhanycz, John Kurland,



Jo Ann Kurland, Marie Grajiuskis, Edward Kunst, Lucile Kunst, Max Rogalski, Ardys Rogalski, Jerry Carlson, Mary Jane Carlson, William Akright, Linda Akright, Russell Tidey, Beula Tidey, William Collins, Thelma Collins, Ward Collins, Pearl Collins, Alvin T. Tomoske, Arlene Tomoske, June O'Hara, Edward O'Hara, Larry Krieger, Lou Ann Krieger, Stephen Hudzinski, Janice Hudzinski, Bennie Demski, Jeanette Demski, Bonnie Dunn, Roy Dunn, Clyde Boone, Nora Boone, Frank Weber, Jr., Charlene Weber, Terry Yore, Patricia Yore, Dale Edinger, Josephine Edinger, Lynn Brown, Renda Brown, Donald Goldner, George Schinske, Bernice Schinske, Jack Dukesherer, Evelyn Dukesherer, Richard Priebe, Linda Priebe, Walter Setlak, Mary Setlak, Henry Priebe, Alyce Priebe, Clyde Kraklau, Marlyn



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Carol Karstens, Kenneth Flowers, Sharon  
Flowers, Philip Sheridan, Irma Sheridan,  
William S. Hull, Donna Hull, W. Sam Hull,  
Helen Hull, Russell Wright, Anita Wright,  
John King, Louise M. King, Theodore  
Forelich, Almanda Forelich, Wilma M. Kime,  
Denton Kime, Richard Herman, Wanetta  
Herman, June Handy, Andrew Street, Betty  
Street, Harold Skibbe, Jeanette Skibbe,  
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Kilberg, Robert Cochrane, Connie Cochrane,  
Aloysius Jeru, Elsie Jeru, Michael  
Amabile, Trudy Amabile, Harvey Belter,  
Emma Belter, Chester Hahn, James Haynes,  
Dennis M. Peek, Yvonne Peek, Clarence  
Case, Helen Case, Walter Ertman, Virginia  
Ertman, Ernest Fairbanks, Rosaleen  
Fairbanks, Stephen Hartman, Vernon Hauch,  
Edwin Juergensen, Elaine Kellog, Harvey



Liggett, Mary A. Liggett, Billy Joe Scott, Margaret Scott, Richard DuFresne, Jean DuFresne, Glenn Jones, Linda Jones, Larry McGowan, James Lombardo, Lynn Lombardo, Rose F. Ricketts, Loren Swisher, Russell Wycoff, Jr., Jane Wycoff, Russell Wycoff, Sr., Margaret Wycoff, Hazel Wycoff, Walter Bennett, Linda Bennett, James Bordon, Rose Bordon, Charles Brooks, and Carol Brooks.



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October Term, 1983

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ZELMA FELLNER, et al.,  
Cross-Petitioners,

v.

BARBARA JEAN BERRY, et al.,  
Respondents.

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CROSS-PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT  
\_\_\_\_\_

Zelma Fellner, et al., Intervenor -  
Defendants in the courts below, cross-  
petition for a writ of certiorari to  
review the judgment of the United States  
Court of Appeals for the Sixth Circuit  
entered in this cause on January 24, 1983,  
and its judgment of April 19, 1983,  
denying re-hearing.



## OPINIONS BELOW

The opinion of the court of appeals is reported at 698 F.2d 813; it is reproduced in the appendix infra, pp. 2A-13A. The court's opinion denying rehearing is unpublished; it is reproduced in the appendix at p. 1A. The May 1, 1981, opinion of the district court, which was affirmed by the court of appeals, is reported at 515 F.Supp. 344 (W.D. Mich. 1981); it is reproduced in the appendix, at pp. 14A-96A. The district court's May 1, 1981, remedial order is unreported; it is reproduced in the appendix, at pp. 97A-100A.

Earlier opinions in this case adopted and relied upon by the Sixth Circuit are reported at 442 F.Supp. 1280 (1977); 467 F.Supp. 695 (1978); 467 F.Supp. 721 (1978); and 494 F.Supp. 118 (1980). Other opinions in this case are reported at 505



F.2d 238 (1974); and 467 F.Supp. 630 (1978).

#### JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. Timely petitions for rehearing were denied on April 19, 1983. This Petition is filed under Rule 19.5 of the Supreme Court Rules and such reliance is here noted. The Petition for Writ of A Certiorari of the Coloma Community School District, to which this Cross-Petition is in response, was received by the undersigned counsel for respondents Zelma Fellner, et al. on July 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

#### CONSTITUTIONAL PROVISIONS

The relevant constitutional provisions are the Tenth Amendment and Section One of the Fourteenth Amendment to the



United States Constitution. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Fourteenth Amendment, Section One, in pertinent part, reads as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

#### STATEMENT OF THE CASE

In 1965 a school consolidation election was held in the Benton Harbor, Michigan, area which resulted in several K-8 school districts being joined with the Benton Harbor City School District, the only district operating a K-12 program.



The school district created by this consolidation election subsequently became known as the Benton Harbor Area School District.

Three of the rural K-8 districts included in this consolidation (Sodus, Chadwick, and Mount Pleasant) made up the geographic area which later was the subject territory (Sodus II) of a school territory transfer petition. Sodus, Chadwick, and Mount Pleasant were opposed to the 1965 consolidation, but were outvoted in the election.

This case was born in 1967 as a racial segregation suit against the newly consolidated Benton Harbor school system. The plaintiffs alleged racial imbalance and discrimination within the schools of the Benton Harbor Area School District, and in 1974 the district court agreed and



ruled in plaintiffs' favor.

Following the trial court's decision in this case and specifically on March 5, 1973, the aforesaid petition to transfer certain property from the Benton Harbor Area School District to the Eau Claire School District was filed with the Berrien County Intermediate School District pursuant to the provisions of a Michigan statute (MCLA 340.461). On April 24, 1973, pursuant to the provisions of §461, et seq., of the Michigan School Code of 1955, the Berrien County Intermediate Board held a hearing on the "Sodus II" petition.

Testimony of those favoring the transfer showed grave concern over the negative effect the consolidation had had on their homogeneous, rural community. Administration of the Berrien County Intermediate School District, in a memo to



its members, listed the most popular reasons citizens cited for desiring the transfer of the Sodus II territory to the Eau Claire School District, including inferior education and low academic achievement levels in Benton Harbor; preference for all-day classes for high school students; adverse effects on families where children had varied school schedules in different school locations; long waits at bus stops; and territory geographically closer to Eau Claire than to Benton Harbor.

On May 2, 1973, the Berrien County Intermediate Board approved the Sodus II transfer petition, noting that the transfer would assist Eau Claire's educational program, would substantially increase the State Equalized Valuation (SEV) per pupil in Eau Claire with only a



minimal resulting reduction in valuation to Benton Harbor, and concluding that the resulting racial change would have increased the percentage of black students in Benton Harbor, a predominantly black district, by only 6/10 of one percent while increasing the percentage of black students in Eau Claire, a predominantly white district, in excess of 1%. The decision of the Berrien County Intermediate School Board was then appealed by Ilene Fox, a Benton Harbor Board member, residing in the Sodus II area, but injunctive action prevented this transfer from ever taking place.

The Sodus II area (so-named because said geographical area is located in Sodus Township) represents the southern-most part of the consolidated area and extends southerly from the rest of the district as a peninsulated appendage surrounded on



three sides by the the Eau Claire district. There were 143 students in the proposed transfer area, 13% of whom were black and 8% of whom were Spanish-American. At the time Benton Harbor had 10,740 students, 65.4 % of whom were black and 1 % of whom were Spanish American. Eau Claire's enrollment was 1,296, 11 % of whom were black and 9.4 % of whom were Spanish-American.

The Eau Claire Board, following the Benton Harbor Board, did not oppose the transfer. Testimony in the record showed that there were sound geographic, demographic, educational, and financial reasons to support the board's decision. The testimony overwhelmingly supported the fact that the transfer, if granted, could not have changed the already clearly-established racial trend in the Benton



Harbor Area School District.

Upon appeal by Ilene Fox to the state, the Eau Claire Board altered its position from one of non-opposition to one of favoring the transfer request. In so doing, it noted that the Eau Claire district had the facilities to accommodate the number of students involved without additional expenditure or capital outlay, that transportation would not present a problem due to the proximity of the transfer area to the existing Eau Claire building facilities.

Testimony showed that the Eau Claire Board had a general idea of what the racial composition of the area to be transferred was, as well as a general idea of the racial composition of Benton Harbor. It was noted by the president of the school board that it was her belief that the position of the board would not



have been affected if the area had, in fact, involved black students only.

Following the appeal, the State Board of Education, on July 3, 1974, upheld the determination of the Berrien County Intermediate School Board. In so doing, the State Board stated sound education-related reasons for its decision:

a. Dual sessions in Benton Harbor are an educational hardship and are disruptive to the ordinary educational process. Benton Harbor has given no indication that the dual sessions would be of short duration. The transfer would not present crowding problems for Eau Claire.

b. Benton Harbor, Eau Claire, and Berrien Intermediate Boards agree with the transfer.

c. The change in attendance area would be minimal because 1) early



elementary students would continue in their local building, and 2) many students at that time attended Eau Claire as tuition students.

d. Duplication of bus routes would be eliminated. Transportation would be simplified.

e. The transfer would not substantially change the racial composition of either Benton Harbor or Eau Claire.

f. The property in question is located in Benton Harbor, not on local initiative, but as a result of the county-wide vote on a state plan.

g. The transfer area is a peninsula into Eau Claire, having three sides contiguous with Eau Claire.

On or about August 20, 1974, plaintiffs in this action filed a motion to add parties and for injunctive relief,



withholding the implementation of the Sodus II transfer but did not seek to add the petitioners in the Sodus II transfer administrative proceedings as parties. On August 23, 1974, the court granted the motion and added as parties defendants the Eau Claire and Coloma School Districts, the Berrien County Intermediate School District, the State Board and Superintendent, the Governor, Attorney General, and the state's Boundary Commission. The court further ordered that the Michigan State Board of Education, John W. Porter, Superintendent of Public Instruction, Eau Claire School District, and the Benton Harbor School District be preliminarily enjoined as follows:

a. The Benton Harbor district from refusing to enroll in Benton Harbor



schools all pupils residing in the area transferred to the Eau Claire District by the State Board order of July 3, 1974, and from refusing to provide all relevant educational benefits necessary for their attendance;

b. The state defendants and the Eau Claire district from interferring with their use by the Benton Harbor District of the property, buildings, pupils, taxes, or any other aspect of the area transferred;

On May 19, 1975, a petition to intervene as defendants was filed in this action by Zelma Fellner, et al. On July 7, 1975, the district court granted the intervention petition but limited the intervention solely to the matter of the Sodus transfer.

There is no evidence that any of the petitioners of the Sodus II transfer had knowledge of the existence of any pending



desegregation case affecting the Benton Harbor Area School District during any portion of the Sodus II territory transfer.

There is also no competent evidence indicating that the petitioners of the Sodus II transfer did anything to affect the territory transfer other than to follow the prescribed procedure for the transfer of territory from one school district to another as provided by Michigan law (MCLA 340.43-340.368).

There is also no competent evidence that any of the Sodus II petitioners had any segregative intent or purpose in petitioning for the Sodus II transfer but rather acted in accordance with the statutory procedures set forth and outlined under the aforesaid Michigan statute.



As pointed out above, had the Sodus II transfer been fully implemented, it would not have had any significant effect on the overall racial composition of the two districts, nor could it have significantly altered the trend of racial change in view of the other demographic factors.

#### REASONS FOR GRANTING THE WRIT

##### I.

THE LOWER COURTS ERRED WHEN THEY VOIDED  
THE TERRITORY TRANSFER ACTION OF THE  
STATE BOARD OF EDUCATION.

This Cross-Petition is filed by Zelma Fellner, et al. and represents the interests of some 190 individuals (hereinafter referred to as Fellner, et al.). Of these, 152 were landowners living within the Sodus II transfer territory. The remaining 38 individual intervenors were residents of the Sodus II



transfer area but who did not own land within that territory.

Seventy-four of the individuals were resident parents with 132 children of school age and 22 of pre-school age. This included the majority of the children of school age residing in the transfer territory.

The parties to this Cross-Petition, prior to a 1965 consolidation election, were all residents within three (3) rural K-8 school districts (Sodus, Chadwick, and Mount Pleasant School Districts). When the school consolidation election was held in 1965, the combined vote of Sodus, Chadwick, and Mount Pleasant was against consolidation. At the time of the consolidation election there was no bonded indebtedness, and the schools had a cash balance. Since consolidation, the residents of this area paid on the joint



assumption of debt and the building site fund to the Benton Harbor Area School District but found that two of their schools were closed and sold, leaving only one building in the area.

Residents of this area continue to feel that consolidation with the Benton Harbor Area School District has been a grave mistake. Their community area no longer has a PTA or common meeting place, and two out of the three schools in the area have been closed. The Sodus II area is rural in character, and the residents wish to continue to have their children attend a rural school.

Worse, family units with children who previously had attended the small rural schools found that their children were divided and bussed to several different schools and were on completely different



school schedules. This disrupted their family life.

Because the Sodus II territory was surrounded on three sides by the Eau Claire School District, it was logical that the residents of the former Sodus, Chadwick, and Mount Pleasant School Districts, wanted to be included within the Eau Claire district.

Judge Hillman, in his May 1, 1981, district court decision, described Eau Claire as a

small, rural, homogeneous agricultural communit[y] with little, if any, business, social or economic interaction with Benton Harbor....In addition to the physical distance between the City of Benton Harbor and the...Township of Eau Claire, other physical barriers exist between these communities. They are separated by wide expanses of agricultural land. In addition, an expressway from Chicago to Detroit circles the east of Benton Harbor, limiting east-west traffic in and out of the city.

(Cross-Pet. App. 15A).



What the court said with reference to the Eau Claire community is equally applicable to the Sodus II transfer area since the Sodus II transfer area is literally encased on three sides by the Eau Claire School District.

The educational desires of the parents of the children living within the Sodus II transfer area, therefore, pursuant to the provisions of Michigan law (MCLA 340.461), filed a petition with the Berrien County Intermediate School District to transfer the former Sodus, Chadwick, and Mount Pleasant School Districts from the Benton Harbor Area School District to the Eau Claire School District. The Intermediate School District approved the territory transfer. The decision was appealed by a member of the Benton Harbor Board of Education who resided in the Sodus II area. Following



an appeal, the State Board of Education, on July 3, 1974, upheld the determination of the Berrien County Intermediate School District, citing sound education-related reasons for its decision.

However, the transfer never became effective because the United States District Court, in this action by Order dated August 24, 1974, joined the Eau Claire School District as a party in a case which previously had only involved the Benton Harbor Area School District. The August 24 Order enjoined the Eau Claire School District from receiving students from the Sodus II area during the pendency of the action.

Cross-Petitioners here contend that the facts of record fail to establish sufficient legal ground for the granting of the subsequent permanent injunction



against the Sodus II transfer. In order to state a claim upon which relief may be granted, plaintiffs had to prove and allege that the Sodus II territory transfer to a substantial degree contributed to or caused the creation or maintenance of segregated schools. Milliken v. Bradley, 418 U.S. 189 (1974).

In addition, plaintiffs' burden of proof requires the shouldering of the obligation to establish discriminatory intent. Keyes v. School District No. 1, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976); and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). As the Court stated in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 254, 272 (1979), "even if a neutral law has the disproportionately adverse effect upon a racial minority, it is unconstitutional under the



Equal Protection Clause only if that impact can be traced to a discriminatory purpose."

In this type of case, therefore, there must be both discriminatory impact and purpose.

Cross-petitioners here contend that the plaintiffs have failed to prove either discriminatory impact or intent. A trial stipulation relative to the territory transfer explicitly stated:

On July 3, 1974, when the State Board considered the appeal of the determination of the Berrien County Intermediate Board of Education granting the petition (Zelma Fellner, et al) to transfer the Sodus II area and affirmed the determination of the Berrien County Intermediate Board of Education granting said petition, the State Board had received from its hearing officer information showing that the Benton Harbor Area Schools had an enrollment of 10,740 students, 65.4% of whom were black and 1.0% of whom were Spanish American; that the Eau Claire School District had an enrollment of 1,296 students, 11.0% of whom were black and 9.4% of whom



were Spanish American and that there were 143 students, 13.0% of whom were black and 8.0% of whom were Spanish American, residing in the transfer area who attended the Benton Harbor Area Schools. Further, the State Board had received from its hearing information showing that upon the affirming of the granting of the transfer the enrollment of the Benton Harbor area schools would have been 10,597 students, of whom 66.0% were black, and .9% were Spanish American, and that upon the affirming of the granting of the transfer the enrollment of the Eau Claire School District would have been 1,439 students, of whom 11.1% were black and 9.4% were Spanish American.

(Partial Stipulation of Facts re: Consolidation, Annexation, Attachment, and Transfer, par. 27).

Therefore, the transfer of the Sodus II territory from Benton Harbor to Eau Claire would not have made any perceptible change in the racial composition of the predominantly black (65.4 %) Benton Harbor Schools. The undisputed facts establish that the transfer would have increased the percentage of black student enrollment in



the predominantly white (80.6 %) Eau Claire District.

In Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 197 (1973), this Court held that it was error to separate "Negroes and Hispanos for purposes of defining a 'segregated' school."

Thus, 21 % of the students (blacks and Spanish-Americans) in the Sodus II transfer area were members of a racial minority class. This would have had no adverse racial impact on the Benton Harbor Area School District, but would have had a slightly favorable impact on increasing the racial minority makeup of a much smaller school district, that being Eau Claire.

If no discriminatory impact is shown, it is irrelevant what the intent was.



Personnel Administrator of Massachusetts  
v. Feeney, supra.

In Phase II of the lower court proceedings determining liability, Judge Noel P. Fox nullified the action of the State Board of Education transferring the Sodus II area from the Benton Harbor Area School District to the Eau Claire School District based upon the finding that the transfer, if not enjoined, would have had the natural probable and foreseeable result in maintaining segregation in Benton Harbor. Berry v. School Dist. of Benton Harbor, 467 F.Supp. 630, 681 (W.D. Mich. 1978).

The district court, in reaching its conclusion of discriminatory purpose, indulged in stringing together a chain of "presumptions," not one of which is close enough to reality to be reasonable. Columbus Board of Education v. Penick, 443



U.S. 483, 490 (1979) (Rehnquist, dissenting). The district court's opinion found discriminatory purpose and, at every critical point in its opinion, fashioned its conclusion on the "foreseeable impact test."

The Court utilized the so-called Oliver presumption which was a presumption created by the Sixth Circuit Court of Appeals. Oliver v. Michigan State Board of Education, 508 F.2d 178, 182 (1974), cert. den. 421 U.S. 963 (1975). After Oliver, supra, "evidence of the natural, probable and foreseeable results of official actions did not merely permit a court to infer discriminatory intent, but positively gave rise to a presumption of such intent." Berry v. School District of the City of Benton Harbor, 494 F.Supp. 118, 122 (W.D. Mich. 1980). This



presumption has been placed into question by this Court, although not expressly ruled upon, in both Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) and Columbus Board of Education v. Penick, supra.

Subsequent to the Phase II hearing, the Honorable Douglas W. Hillman, succeeded Judge Fox and presided over the remedy portion of the proceeding. Judge Hillman, however, was presented with a motion for a new trial. Although Judge Hillman, after reviewing the Phase II opinion rendered by Judge Fox and the decisions of this Court in Columbus and Dayton, supra, correctly concluded that his predecessor had erroneously utilized the Oliver presumption. He, however, refused to grant a new trial "[b]ecause Judge Fox did not base his findings wholly on a now invalid rule of law, but made



permissible inferences from the total circumstances and because...the evidence of circumstances...[w]ere sufficient to support such inferences...." Berry, supra, 494 F.Supp. at 122. Judge Hillman made no specific findings of fact of his own.

The liability findings in Phase II against the added defendants, which resulted in the federal court's nullification of the State Board of Education's territory transfer decision, is fatally flawed by Judge Fox's misallocation of the burden of proof in arriving at such findings. This flaw was not corrected by Judge Hillman's ruling on the motion for new trial.

The court of appeals, although making no effort to consider the correctness of the district court's invalidation of a



decision by the Michigan State Board of Education as to a school territory transfer based upon educational considerations, did note that "[t]his record simply does not support the proposition that the activities of white parents in their Sodus I and Sodus II efforts to join the School District of Eau Claire and the successful activities of the white parents of Eaman Area to join the Coloma School District occasioned the massive long pre-existing problems of racial discrimination and racial isolation within the School District of Benton Harbor." (Cross-Pet. App. 8A).

It is submitted that there is absolutely no evidence in the record to support a finding of a causal relationship between the territory transfer of Sodus II to the Eau Claire School District and the racial composition as it exists in the



Benton Harbor Area School District. The evidence is uncontroverted that any action or inaction on the part of any added defendants, including those added as the result of the Sodus II transfer, would not have changed these demographic trends or affected the outcome of the racial composition of the district.

The parents of the children living in the Sodus II transfer area were properly concerned with the loss of community identity and its resulting adverse impact on its students. They were properly concerned with children waiting for long periods of time at bus stops. They were properly concerned with overcrowding and split sessions being held in the Benton Harbor schools. They were properly impressed by the fact that the Eau Claire District had a new high school with enough



room to accommodate additional students. They had a right to desire to have their student children return to the general area of their own community.

The State Board of Education, presumably skilled and knowledgeable as to educational concerns, made certain findings concerning the territory transfer. Among these findings was the fact that at that time the Benton Harbor high schools were on double shifts, and the transporting of students in the area was burdensome to the Benton Harbor District. The State Board also was not insensitive to the racial discrimination question and specifically found that the transfer would not substantially change the racial composition of either Benton Harbor or Eau Claire. The board was also sensitive to the fact that the property in question was located in Benton Harbor, not



on local initiative, but as a result of a forced county-wide vote on a state plan. Pertinent also, as far as the board was concerned, was the fact that the transfer area was a peninsula into Eau Claire, having three sides contiguous with Eau Claire.

There were financial considerations involved also. Eau Claire is a poor school district with a low per pupil State Equalized Valuation and high bonded indebtedness. The addition of students and tax base to that district was important to the State Board of Education from its statewide planning perspective.

Petitioners did nothing other than follow long-existing and often used statutory procedures to affect what they believed to be of educational benefit to their children with no real impact on the



Benton Harbor School District.

There is no evidence that the State Board of Education acted other than in accordance with established, statutorily provided procedure to determine the educational merits of the transfer. The bottom line is that there is no competent evidence that any participant acted with a segregative purpose or intent.

This Court has long recognized that local school boards have broad discretion in the management of school affairs. Board of Educ., Island Trees Union Free School Dist. v. Pico, \_\_\_ U.S. \_\_\_, 102 S.Ct. 2799, 2806 (June 25, 1982).

When the Intermediate School District determined to grant the petition of the transfer of the territory, it also made its decision solely on the basis of relevant educational concern.

As Justice Powell has stated:



School boards are uniquely local democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country. During their most formative and impressionable years, apart from health, no subject is closer to the hearts of parents than their children's education during these years. For those reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board responsible locally to the parents and citizens of school districts.

Id. at 2822 (Powell, dissenting).

Justice O'Connor similarly stated:

It is not the function of the courts to make the decisions that have been properly delegated to the elected members of school boards. It is the school board that must determine educational suitability....

Id. at 2835 (O'Connor, dissenting).

As Justice Rehnquist observed, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply



implicate basic constitutional values." Id. at 2835, citing, Epperson v. Arkansas, 393 U.S. 97, 104 (1963).

"The federal judiciary should be limiting, rather than expanding, the extent to which the courts are operating the public school systems of our country." Columbus Board of Education v. Penick, supra at 480 (Powell, dissenting).

The difficulty with this decision is that it ignores the concerns of parents for their children's education, concerns that were addressed by recognized state procedures and carefully considered at two levels by those elected to serve the educational needs of their citizens. "If public education is not to suffer further, we must 'return to a more balanced evaluation of the recognized interest of our society in achieving desegregation



with other educational and societal interests a community may legitimately assert.'" Columbus Board of Education, supra at 486 (Rehnquist, dissenting).

It is respectfully submitted that neither the district court nor the court of appeals have given the proper attention to the long-established, uniformly-held principle that public education is reserved to the states or to the people under the Tenth Amendment to the United States Constitution.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 44 (1973), this Court stated:

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system.

It is respectfully submitted that managing of public schools is vested with



local and state boards of education and administrators to whom the states have delegated such responsibilities. Of course, the federal courts do have power and authority to override those prerogatives to protect rights under the Fourteenth Amendment. We contend, however, that the federal courts have the power to supercede the decisions of boards of education only where their actions are clearly unconstitutional. Petrey v. Flaughner, 505 F.Supp. 1087, 1090 (E.D. Ken. 1981).

In this case the record cannot support a determination that the actions of the Intermediate School District and State Board of Education are unconstitutional. Therefore, the state determination relative to the transfer of territory from the Benton Harbor Area School District to the Eau Claire School



District (pursuant to the applicable state law relative to school district transfers including MCLA 340.461-340.648 inclusive) should be respected and given full force by the federal court unless plaintiffs have proven by a preponderance of the evidence both that the transfer had a substantial discriminatory impact and that the State Board of Education acted with segregative purpose.

## II.

THE LOWER COURTS ERRED IN PERMANENTLY  
ENJOINING ANY SUBSEQUENT TRANSFERS FROM  
THE SODUS II TERRITORY.

The reasons previously set forth under section I above are fully applicable here. In addition, the Cross-Petitioners contend that the permanent injunction is overbroad. It prevents the use of territory transfers for sound educational reasons whether or not there is any



segregative intent or even impact.

The court's order sustained by the court of appeals states:

Similarly, transfer of the Sodus II area, or any area of the Benton Harbor School District which includes any part of the Sodus II territory, is permanently enjoined. The defendants are enjoined and prohibited from initiating, encouraging, approving or granting a request for transfer of the Sodus II area out of the Benton Harbor School District to the Eau Claire School District or any other neighboring school district. In addition, the Eau Claire School District is permanently enjoined from receiving tuition students from the BHASD, except under the terms and conditions included in the inter-district transfer aspect of the court's desegregation plan.

(Cross-Pet. App. 38A).

Under the terms of the court's opinion, "any student, at any grade level, who is a resident in the Benton Harbor School District, shall be given an opportunity to elect to attend school in either the Coloma or Eau Claire districts,



likewise, any resident at any grade level, who is a resident in the Coloma or Eau Claire School Districts should be given an opportunity to elect to attend school in the Benton Harbor School District. The exercise of this choice should be limited to elections that will result in decreasing racial segregation in each school system." (Cross-Pet. App. 54A-55A). The effect of the court's order is to cast in concrete the court's judgment that a transfer of territory or a student transfer may never take place except when it will decrease racial segregation in each school system. Excluded from all consideration are transfers of either territory or students based upon other educational concerns.

School territory transfers have long been an effective and appropriate device used, at least in Michigan, to alleviate



individual hardships and to permit sound educational decisions to be made with flexibility.

The Tenth Amendment prohibits the intrusion of the federal government into state educational matters absent a showing that the implementation of state action pursuant to state law results in some specific unconstitutional action. To prohibit in futuro the use of school territory or student transfers pursuant to Michigan law, within the Sodus II area, is violative of Tenth Amendment rights and, in fact, denies to cross-petitioners the equal protection of the law. The effect of the court's ruling in this case is to practically strike from the statute books of Michigan a sound educational device.

The long-range effect of this action is to prevent the use of the transfer



petition even where all parties honestly believe that there is no adverse racial impact, where there's a total absense of racial motivation, and even where the transfer would educationally benefit all children, whether they be black, white, Spanish-American, or some other racial minority.

As Justice Rehnquist has noted:

The time has come for a thoughtful reexamination of the proper limits of the role of courts in confronting the intractable problems of public education in our complex society. Proved discrimination by state or local authorities should never be tolerated, and it is a first responsibility of the judiciary to put an end to it where it has been proved. But many courts have continued also to impose wide-ranging decrees, and to retain ongoing supervision over school systems. Local and state legislative and administrative authorities have been supplemented or relegated to initiative-stifling roles as minions of the courts. Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism to a subject so inherently difficult and so



politically sensitive that the prospect of others confronting it seems inviting. Federal courts no longer should encourage this deference by the appropriate authorities -- no matter how willing they may be to defer. Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education.

Columbus Board of Education v. Penick,  
supra at 487-488 (1979) (Rehnquist,  
dissenting).

#### CONCLUSION

This case presents important issues concerning the constitutional limits of the federal judiciary as it impacts on the administration of public education, which is a state or local concern. The issues here implicate the relationship between national and state power under our federal system, intrude upon the power of those delegated the responsibility to make educational decisions beneficial to the



public in general, and to the quality of education to the individual student.

For these reasons, this Court should grant Cross-Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for  
Cross-Petitioners



## CERTIFICATE OF SERVICE

I, Lee Boothby, certify that on the 16th day of August, 1983, I served three (3) copies of the attached Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by having them sent, first class mail, postage fully prepaid, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, to each of the following named attorneys of record:

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/s/

\_\_\_\_\_  
Lee Boothby



## **APPENDIX I**



1-A

81-1391-96

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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BARBARA JEAN BERRY, et al., *Plaintiffs-Appellants*

v.

SCHOOL DISTRICT OF THE CITY OF  
BENTON HARBOR, et al.  
*Defendant-Appellees*

WILLIAM G. MILLIKEN, Governor  
of the State of Michigan, et al.  
*Defendants-Appellants*

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FILED  
APR 19 1983  
JOHN P. HEHMAN, Clerk

**ORDER**

Before: EDWARDS, Chief Circuit Judge, PHILLIPS and  
PECK, Senior Circuit Judges.

This court has received and considered certain motions for "clarification" and rehearing of its opinion dated January 24, 1983. We have determined from the briefs filed by the parties that said opinion is being interpreted and followed by the parties in accordance with both its purport and its language; therefore, said motions are hereby denied except that the word "continued" is hereby stricken from the last paragraph of said opinion.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman  
JOHN P. HEHMAN  
Clerk



## APPENDIX II



Nos. 81-1391 to 81-1396.

United States Court of Appeals,  
Sixth Circuit.

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BARBARA JEAN BERRY, et al. *Plaintiffs-Appellants*,  
v.

SCHOOL DISTRICT OF the CITY OF  
BENTON HARBOR, et al.,  
*Defendants-Appellees*.

William G. Milliken, Governor of the  
State of Michigan, et al.,  
*Defendants-Appellants*.

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Argued June 21, 1982.  
Decided Jan. 24, 1983.

Before EDWARDS, Chief Judge, and PHILLIPS and  
PECK, Senior Circuit Judges.

GEORGE CLIFTON EDWARDS, Jr., Chief Judge.

This case has presented in one form or another almost all of the issues which are possible in a school desegregation case. This action was initiated in November, 1967. It was first heard before District Judge W. Wallace Kent, and later heard by District Judge Noel Fox and was still later heard by District Judge Douglas Hillman.<sup>1</sup> The protracted history of this case is recorded in the following opinions of the District Court *Berry v. School District of City of Benton Harbor*, 515 F.Supp. 344 (W.D.Mich.1981), 494 F.Supp. 118 (W.D.Mich.1980), 467

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<sup>1</sup> Judge Kent became a member of the U.S. Court of Appeals for the Sixth Circuit on December 18, 1970. Judge Fox succeeded him and presided over this case for over nine years. Judge Fox was replaced by Judge Hillman by order on June 19, 1980 due to the former's illness.



F. Supp. 721 (W.D.Mich.1978), 442 F. Supp. 1280 (W.D.Mich.1977), and an opinion from a prior appeal to this court, *Berry v. School District of Benton Harbor*, 505 F.2d 238 (6th Cir.1974).

In its original form plaintiffs were representatives of families of black students presenting complaints of racial segregation in a newly consolidated school system which encompassed the largely black city of Benton Harbor and fifteen neighboring and previously separate school districts which were semi rural or rural in nature and largely white in school population. Subsequent to consolidation, two other independent districts were joined to Benton Harbor Area School District (BHASD), one by annexation (Eaman) and the other by attachment (Martindale).

When this case was heard before Judge Kent he concluded that a number of practices by the then defendant School District of the City of Benton Harbor were racially discriminatory. But he also held that they did not result in de jure segregation as he interpreted it at that time. This court affirmed his finding pertaining to discriminatory practices in *Berry v. School District of the City of Benton Harbor*, 505 F.2d 238 (6th Cir.1974).

In the opinion of this court, however, we found a number of important indicia of intentional, de jure segregation:

The school system was in fact racially imbalanced, teachers were assigned on the basis of race, the physical condition of the predominantly black schools was generally inferior to the conditions in the predominantly white schools, and the method of assigning students to learning groups in the black junior high school deprived black students of an equal opportunity for an education. The Supreme Court has stated that discrimination in these areas of education constitutes a prima facie case of the existence of a dual school system. *Keyes v. School District No. 1, Denver Colorado*, 413 U.S. 189, 201, 93 S.Ct. 2686, [2694], 37 L.Ed.2d 548 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18, 91 S.Ct. 1267, [1277] 28 L.Ed.2d 554 (1971); *Green v. County School Board*, 391



U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). We are satisfied that a prima facie case was made out in this instance.

505 F.2d at 242.

The case was then remanded for reconsideration of the District Court's failure to deal with "official acts [which] resulted in the constitutionally impermissible dual school system." Meantime, of course, new legal standards have emerged. See *Bradley v. Milliken*, 484 F.2d 215 (6th Cir.1973) (en banc), *rev'd*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), so as to prohibit on the facts of that case consideration of a desegregation plan crossing district lines. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) and *Dayton Board of Education v. Brinkman (Dayton II)*, 443 U.S. 526, 537, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979) have made plain that proof of segregative intent on the part of the party against whom a remedy was ordered was required to establish a constitutional violation. They also held that the remedy for any violation found must be an appropriate response for the impact of the violation concerned.

Subsequent to Judge Kent's first trial and this court's remand, plaintiffs added two new contentions concerning liability and four new defendants. These defendants were the adjoining Coloma and Eau Claire School Districts, the Berrien County Intermediate School District, and the Michigan Board of Education. The contentions concerned the Eaman and Sodus area of the Benton Harbor School District. Residents of the Eaman area wanted their children to transfer from the Benton Harbor Area School District to the adjacent Coloma School District and the Sodus residents wanted transfers from the BHASD to the Eau Claire School District. The Sodus transfer to Eau Claire petition was approved after it was revised to exclude a substantial number of black children. The State Board of Education (SBE) eventually approved of both transfers. The Eau Claire transfer decision was, however, enjoined



by the District Court and this action was upheld by this court. These transfers would have deprived the Benton Harbor Area School District of approximately 150 white students in each instance thereby adding to the racial identifiability of the Benton Harbor School District. The record also indicates that both Eau Claire and Coloma allowed some additional tuition transfers.

On a record written before Judge Fox before his illness (subsequently reviewed by Judge Hillman), both Judge Fox and his successor, Judge Hillman, have now found that defendants Benton Harbor Area School District and the School Districts of Eau Claire and Coloma, as well as Benton Harbor Intermediate School District and the SBE, have intentionally committed additional discriminatory acts which account, at least in part, for present racially segregated conditions in the Benton Harbor Schools.

The key issue as we see this appeal is the nature of the remedy ordered by the District Judges; the remedial order appealed from (in which both judges agreed) would 1) return the Sodus II area and its 200 pupils and its four room school house to the Benton Harbor School District; and 2) leave the Eaman area remaining in Benton Harbor Area School District.

The two District Judges disagreed, however, on a significant aspect of remedy. Judge Fox had concluded that the discriminatory practices that he had found on the part of all defendants were such as to warrant relief in terms of an interdistrict remedy merging the Benton Harbor, Eau Claire and Coloma school districts. Judge Hillman, reviewing the record written before Judge Fox, agreed with his liability findings as to all defendants but parted company with him in relation to ordering a mandatory interdistrict remedy which would merge the three districts.

Judge Hillman found specifically:

Interdistrict violations with interdistrict effects of sufficient seriousness have been established in this record on liability to warrant interdistrict involvement in a remedy



under this test. The actions of Coloma and Eau Claire not only contributed to segregation, they also contributed to disruption within the Benton Harbor District which rendered school officials unable to solve the racial and educational problems facing the district. Coloma's contribution to these problems, if measurable and if measured, would certainly be perceived as being greater than any incremental contribution made by Eau Claire school officials. The effect of any racially inspired conduct on the part of Eau Claire by school officials is diminished by the fact that the Sodus II property transfer was never completed. The successful Eaman transfer had a much more grave effect on the events that followed it than the aborted Sodus II transfer. This disparity in incremental contributions, however, exists not because of any different degree of racially inspired conduct in the two school districts, but because the Sodus II transfer was enjoined by this court.

Both districts participated in racially motivated planning that in one instance did and in the other would have, created opportunities for white property owners and students to abandoned [sic] the fragmenting iceberg. Violations by both school districts have had a clear, interdistrict effect. These constitutional wrongs call for an interdistrict remedy, but something less than consolidation of these three districts and less than complete desegregation in each district.

*Berry*, 515 F.Supp. at 353-54.

We recognize that defendants Eau Claire, Coloma, Benton Harbor Intermediate School District and the Michigan State Board of Education all dispute the two District Judges' findings of liability based upon the findings of racially discriminatory intent. We have reviewed the lengthy opinions of the two District Judges on these two issues as to all defendants and conclude that we cannot hold their findings of fact to have been clearly erroneous or that their conclusions of law were violative of federal constitutional principles as exemplified by the opinions of the Supreme Court of the United States. In thus dealing with the issue of liability, we rely upon and adopt the opinions of Judge Fox dated August 22, 1977 entitled *Berry v. School District of the City of Benton Harbor*, 442 F.Supp. 1280 (W.D.Mich.1977) and *Berry v. School District of the City of*



*Benton Harbor*, 467 F.Supp. 721 (1978) and those of Judge Hillman dated June 19, 1980 in *Berry v. School District of City of Benton Harbor*, 494 F.Supp. 118 (W.D.Mich.1980) and *Berry v. School District of the City of Benton Harbor*, 515 F.Supp. 344 (W.D.Mich.1981).

In spite of the many arguments which are presented by the various appellants, we believe that the only argument of merit which should concern this court is that which bears directly upon the appropriateness of an interdistrict remedy. Judge Fox clearly considered the violations he found on the part of the SBE, the Benton Harbor Intermediate School District, and the School Districts of Eau Claire and Coloma to be sufficient not only to support his findings of intentional racial discrimination and segregative action but also to be of sufficient impact to support interdistrict remedies. Judge Hillman's review of Supreme Court precedent dealing with remedy led him to take a different view. In relation to the one area, the Eaman area, which had been transferred to the Coloma School District, along with its elementary school, he ordered that retransfer of the elementary school to BHASD be accomplished without any financial liability falling on the Benton Harbor District. He also permanently enjoined the transfer of the Sodus II area out of the Benton Harbor School District to the Eau Claire School District or any other school district. Further, he enjoined both the Coloma and the Eau Claire School Districts from receiving transfers of students from the Benton Harbor School District "except under the terms and conditions included in the interdistrict transfer aspects of this court's desegregation plan." These are remedial actions directly related to the remedying of the specific intentional segregative acts caused by the defendants as shown in this record. Those aspects of Judge Hillman's remedial order are therefore fully affirmed.

We turn now to consideration of the Berry plaintiffs and the School District of Benton Harbor's appeals claiming that Judge Hillman erred as a matter of law in failing to order a mandatory interdistrict desegregation plan under the circumstances of this case. Appellant Benton Harbor claims that Judge Hill-



man's denial of interdistrict relief was founded upon Judge Hillman's lack of acquaintance with the area concerned and improper weight which he allegedly gave to the "unpopularity of busing" and "a strong desire to maintain autonomous local school districts." We do not find support in this record that Judge Hillman ignored any local conditions which would support a different conclusion than that at which he arrived. This circuit has repeatedly followed the mandates of the Supreme Court for desegregation of school systems including in such desegregation plans the mandatory use of busing where essential to the success of the desegregation plan. *Penick v. Columbus Board of Education*, 583 F.2d 787 (6th Cir.1978), *aff'd*, 443 U.S. 449, 99 S.Ct. 2982, 61 L.Ed.2d 666 (1979); *Brinkman v. Gilligan*, 583 F.2d 243, *aff'd*, *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979); *Reed v. Rhodes*, 607 F.2d 714 (6th Cir.1979), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982); *Kelley v. Nashville-Davidson County Board of Education*, 479 F.2d 810 (6th Cir. 1973). As to maintenance of autonomous local school districts, this circuit has never viewed such an objective as constitutionally sacrosanct. This is particularly true in the State of Michigan where the SBE has always had absolute power to change or alter school district boundaries and to abolish and consolidate whole school districts with or without the agreement of the local boards of educations and their constituents.

Our affirmance of Judge Hillman in his rejection of an interdistrict remedy is based directly upon the fact that school desegregation case law in the Supreme Court limits this remedy to situations where the race discrimination and intentional segregative practices are such as to have been a substantial cause of the condition which requires interdistrict solution.

This record simply does not support the proposition that the activities of white parents in their Sodus I and Sodus II efforts to join the school district of Eau Claire and the successful activities of the white parents of the Eaman area to join the Coloma School District occasioned the massive long pre-



existing problems of racial discrimination and racial isolation within the School District of Benton Harbor. This is of course particularly true since prompt legal action prevented the transfer of the Sodus area from ever taking place, although the transfer of approximately 150 white students from the Eaman area of the Benton Harbor School District to Coloma did occur.<sup>2</sup> The actual impact of the transfers upon the black-white ratio of Benton Harbor School District was less than 1 percent.

We have of course considered appellant Benton Harbor's argument that the psychological impact of the "white flight" motive involved in both these efforts was far more serious in its psychological effect upon Benton Harbor than the numerical impact of the transfer would have indicated. In weighing this issue, we turn to Supreme Court precedent which deals directly with interdistrict transfers and consolidations.

In one of the first cases to deal with remedy in its relationship to intentional segregative acts, Chief Justice Burger enunciated for the court the general principle which runs through all remedy cases:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. *As with any equity case, the nature of the violation determines the scope of the remedy.* In default by the school authorities of their

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<sup>2</sup> In 1960 Benton Harbor had a population of 19,000, 70 percent of which was white. At the time this case was heard, it had a population of 15,000 of which 20 percent was white. Black students made up 37 percent of the district school population in 1966 and at the time the District Court was dealing with this, black students made up 77 percent of the district's 9,100 students.



obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. (Emphasis added).

*Swann*, 402 U.S. at 16, 91 S.Ct. at 1276.

This principle was carried further by the same author in a case which considered an interdistrict remedy in the instance of the Board of Education of the City of Detroit:

*The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, 402 U.S. at 16 [1276]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (Emphasis added).*

*Milliken*, 418 U.S. at 744-45, 94 S.Ct. at 3127.

In *Dayton II*, *supra*, the majority opinion by Justice Rehnquist further spelled out the necessity of finding not only intentional discriminatory actions on the part of a defendant school board but relating them directly to redress only those segregative effects which had been caused by the intentional segregative acts:

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segrega-



tion by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which are intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington v. Davis*, [426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597] *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. *If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton School population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.* *Keyes*, 413 U.S. at 213 [93 S.Ct. at 2699]. (Emphasis added).

*Dayton Board of Education*, 433 U.S. at 420, 97 S.Ct. at 2775.

Our review of this long record against the legal standards emphasized above does not allow us to reverse Judge Hillman in his holding that the discriminatory acts he found on the part of the school boards of Eau Claire and Coloma and on the part of the Benton Harbor Interdistrict School Board and the Michigan SBE did not warrant a wiping out of school district lines and a merger of the three school districts.

A long look back at the history of this litigation discloses that the Benton Harbor schools were identifiably black long before the Benton Harbor Area School District was formed. In addition, the original charges of racial discrimination which were made by black parents in the Benton Harbor Area School District and found valid by Judge Fox were based upon actions taken by that School Board in discriminatory assignment of teachers, and discriminatory assignment of pupils. It is against this background which was clearly not produced by either the Sodus or the Eaman transfers that we must consider the numerical or psychological impact of the four defendants' actions in approving the two transfers. Thus viewed, it is hard



indeed to fault Judge Hillman in finding that the only interdistrict boundary change warranted by the discriminatory acts proven before him was that of ordering return of the Eaman area to the Benton Harbor Area School District. On this record we conclude that we cannot do so.

We now turn to the last issue in this case. Judge Hillman clearly was not (nor are we) satisfied with the relative ineffectiveness of the remedy we have just discussed and affirmed. His opinion continues for many pages to discuss the development of a desegregation plan between the Benton Harbor School system and the school systems of Coloma and Eau Claire. He describes this as a "voluntary" desegregation plan contemplating the construction of "magnet schools." We have no doubt that this sort of planning could be engaged in by the three school districts concerned with the approval and cooperation of the SBE and the Benton Harbor Interdistrict School District. To the degree that Judge Hillman's opinion in this regard represents a series of suggestions to the local and state authorities concerned, we have no hesitation in endorsing them. We point out, however, that they are not enforceable orders and that the only agency before this court with power to require the measures which Judge Hillman talks about in the building of these magnet schools is the Michigan SBE as a result of the broad powers given it in the 1963 Constitution of the State of Michigan. That Constitution provides; "Article I, Section 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Article VIII, section 2, states that "[e]very school district *shall* provide for the education of its pupils *without* discrimination as to religion, creed, race, *color* or national origin." Article VIII, section 3, of the Michigan Constitution gives the SBE "leadership and general supervision over *all public education*," and further provides that the SBE "*shall* serve as the general planning and coordinating body for all public education." (Emphasis supplied.) Mich.Comp.Laws Ann § 380.1281



(1977) reinforces the State Board's duty to enforce the laws against discrimination in education by stating that "SBE *shall* require each board, and intermediate school board, and the officers thereof to observe the laws relating to school." With these state law powers, the Michigan SBE could, of course, be of great assistance to the District Court assuming he was able to gain the active cooperation of that body.

On remand of this case to the District Court after completion of appellate review, the District Judge might, however, meet continued obdurate opposition to his voluntary desegregation plan from some or all four of the added defendants. If so he may then consider whether or not such conduct represents additional violations with additional "incremental segregative effect," which might warrant consideration of orders of a mandatory nature to effectuate his desegregation plan. See *Dayton Board of Education*, 433 U.S. at 420, 97 S.Ct. at 2775.

PECK, Senior Circuit Judge, concurring.

While I am in entire accord with the holding expressed in the majority opinion, I have reservations concerning the inclusion therein of the final two paragraphs. Apart from their apparent inconsistency with the balance of the opinion, they seem to me to be advisory in nature and while I have no quarrel with the sentiments expressed in the two questioned paragraphs, I would prefer to let decision in the circumstances hypothesized await the day of their presentation.



### **APPENDIX III**



UNITED STATES DISTRICT COURT,  
W. D. MICHIGAN, S.D.

No. C.A. 9.

BARBARA JEAN BERRY, et al., *Plaintiffs*,

v.

SCHOOL DISTRICT OF THE CITY OF  
BENTON HARBOR, et al.,  
*Defendants*.

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May 1, 1981.

DECISION AND REMEDIAL ORDERS

DOUGLAS W. HILLMAN, District Judge.

INTRODUCTION

This is a school desegregation action involving three local school districts in Berrien County, Michigan. Berrien County is located in the southwestern corner of Michigan, bounded on the west by Lake Michigan and on the south by the Indiana border. The county's population is approximately 172,000. Twenty-five percent of that population lives in three principal cities of Benton Harbor, St. Joseph, and Niles. Benton Harbor, with a population of approximately 15,000 is the largest city.

The Benton Harbor Area School District (BHASD) is the largest school district in Berrien County with approximately 9,100 students.<sup>1</sup> The district presently has 77% black student enrollment. It has been the major focus of this school desegregation litigation. Coloma and Eau Claire are both

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<sup>1</sup> This attendance figure for the Benton Harbor School District is taken from attendance data compiled in a district-wide pupil count taken on October 3, 1980. Coloma and Eau Claire School Districts attendance below, data is taken from a district-wide pupil count conducted on September 26, 1980.



predominantly white, rural school districts that abut the borders of the BHASD. Coloma School District is contiguous to BHASD directly to the north and northeast. The Eau Claire district borders the southern peninsula of the BHASD on its east border and southwest corner.

BHASD is the largest of these three school districts. It was formed in 1965 by consolidation of 16 kindergarten through eighth grade school districts, whose high school students attended the Benton Harbor High School. Subsequently, two additional K-8 districts were added to the consolidated district.

Coloma and Eau Claire are substantially smaller K-12th grade school districts with a significantly different racial make-up in their student populations. The Coloma district is the largest of these two districts with enrollment of 2,433 students, six of whom are black. The Eau Claire district has 879 students. Seventy-three of its students are black. The City of Benton Harbor lies at the far west end of the school district and is approximately 15 miles southwest of the City of Coloma and 15 miles northwest from the Township of Eau Claire.

Both Coloma and Eau Claire are small, rural, homogeneous agricultural communities with little, if any, business, social or economic interaction with Benton Harbor. These towns do not form a metropolitan area with the City of Benton Harbor. In addition to the physical distance between the City of Benton Harbor and the City of Coloma and the Township of Eau Claire, other physical barriers exist between these communities. They are separated by wide expanses of agricultural land. In addition, an expressway from Chicago to Detroit circles the east of Benton Harbor, limiting east-west traffic in and out of the city.

It is also important to understand the population migration in and out of Benton Harbor within the past 15 years. Black students constituted 37.3% of the Benton Harbor district enrollment in 1966, 73.1% in 1976, and approximately 77% in 1981. Several factors account for this rapid change in the racial composition of the area and its school district. Movement of



white population out of the city has accelerated and at the same time black movement into the city has increased. In addition, the black population presently has a birth rate that exceeds the white birth rate by 200%. These population trends are not unique to Benton Harbor, but have been characteristic of most urban centers throughout the country in the past two decades.<sup>2</sup> In 1968, the Whirlpool Corporation, Economic and Marketing Department, completed a demographic study of the area entitled: "Population and Mobility Trends in Benton Harbor." In this report, Whirlpool recognized this established population trend and projected that black population in the area and enrollment in the school district would continue to increase.

In addition, the City of Benton Harbor has suffered an economic disaster within the past decade. This fact cannot be ignored in assessing the segregative impact of the unconstitutional acts of these defendants. Benton Harbor presently totters on the brink of bankruptcy. The downtown business district is a blighted area. It covers 11 square blocks and in that area over 90% of the stores have been closed. Unemployment is up 700% since the 1960s. The city is hopelessly in debt, existing on a day-to-day basis and over the past several months has seriously contemplated receivership.

I mention these facts only to demonstrate the seriousness of problems that Benton Harbor has experienced and the complexity of devising an effective desegregation remedy in an atmosphere of urban uncertainty, decay and chaos.

In spite of this gloomy overview, it is apparent that Benton Harbor still has a large number of dedicated school officials, board members and interested parents dedicated to improving the quality of the children's education.

This desegregation case has been in the federal judicial system for more than ten years. It has previously been

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<sup>2</sup> See, Sterlieb and Hughes, J. W., "The Changing Demography of the Central City", *Scientific American*, Volume 243, No. 2, at 448 (August 1980).



assigned to two different federal district judges who have heard and decided the liability phase of the litigation.<sup>3</sup> In February, 1980, the case was reassigned to me for formulating, adopting and implementing a remedy. This opinion includes the court's desegregation remedy plan.

### HISTORY OF THE CASE

This action was initiated in November, 1967, by parents of black students in the Benton Harbor Area School District (BHASD) and by the National Association for the Advancement of Colored People (NAACP) against the Benton Harbor School District. In August, 1974, the plaintiff's complaint was amended to include the Governor of the State of Michigan, the

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<sup>3</sup> This school desegregation case was originally heard by Judge W. Wallace Kent. Judge Kent found that several practices of the defendant BHASD were discriminatory. However, he concluded that the racial imbalance in the Benton Harbor schools was not a result of *de jure* segregation. The Sixth Circuit affirmed in part and reversed in part, finding that a prima facie case of *de jure* segregation had been made out against the Benton Harbor School District. (505 F.2d 238 (6th Cir. 1974)). The case was remanded to the district court to provide an opportunity for the school district to rebut.

On remand, the case was reassigned to Judge Noel P. Fox. Motions by plaintiffs to add additional defendants and to enjoin transfer of a predominantly white area (Sodus II) out of the BHASD to the Eau Claire district was granted. The added defendants were the Michigan State Board of Education; John W. Porter, as Superintendent of Public Education of the Board of Education of the State of Michigan; the Berrien County Intermediate School District and the Boards of Education of the Eau Claire School District and the Coloma School District. The Sixth Circuit affirmed both the issuance of the injunction and the court's order adding additional defendants. Liability was heard and decided in two phases by Judge Fox. The first phase included findings of liability against the Benton Harbor School District, 442 F.Supp. 1280 (6th Cir. 1977). The second phase included findings of liability against the added defendants, 467 F.Supp. 630 (6th Cir. 1978).



Michigan Attorney General, the Michigan State Board of Education, the State Superintendent of Public Education (hereinafter referred to as state defendants), and the Coloma and Eau Claire School Districts as additional defendants.<sup>1</sup>

The facts underlying the present litigation have been fully discussed by the court in its earlier opinions. Consequently, a complete recitation of the facts need not be repeated here. The court refers the interested reader to two opinions on liability that appear at 442 F.Supp. 1280 (6 Cir., 1977) and 467 F.Supp. 630 (6 Cir., 1978) for a full understanding of the facts. In addition, see this court's opinion affirming the findings and conclusions on liability which appears at 494 F.Supp. 118 (D.C. 1980). Liability of each of these defendants has already been determined. The issue presently before the court is establishment of a constitutionally acceptable, fair, understandable and workable remedy.

The touchstone of any school desegregation remedy is that the "scope of the remedy is determined by the nature and extent of the constitutional violation." *Swann v. Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, at 16, 91 S.Ct. 1267, at 1276, 28 L.Ed.2d 554 (1970). Consequently, a brief review of the findings of fact made by the court on the question of liability is appropriate.

Liability was tried and findings on liability were made in two separate phases. Phase I dealt only with the conduct of the Benton Harbor Area School District. In Phase II, the court considered the conduct of the additional defendants, including the Governor of Michigan, the Attorney General of Michigan, the Superintendent of Public Instruction of Michigan, the State Board of Education, the Berrien County Intermediate School District and its Superintendent, and finally, the Coloma and Eau Claire School Districts and their superintendents.

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<sup>1</sup> All of the defendants added in August, 1974, including the state defendants and the Coloma and Eau Claire School Districts, are referred to as "added defendants".



In Phase I of this litigation, the court found that the BHASD failed to rebut a prima facie showing of *de jure* segregation established in an earlier proceeding before Judge Kent.<sup>5</sup> The unconstitutional, segregative conduct of the district pervaded the entire school district. The continuing purpose of the school authorities in several of their policies, was to isolate black students in certain schools and within certain classrooms while preserving the predominantly white character of other schools and classrooms. The evidence demonstrated that within the Benton Harbor District, decisions with respect to assignment of teachers, use of a "tracking" program at one junior high school, attention to conditions of school structures, provision of educational supplies, busing of students, established feeder patterns, placement of portable classrooms and temporary facilities, and inconsistent application of a neighborhood school policy were undertaken with an intent to segregate students and teachers by race. In addition, in 1973 the district acted with an unconstitutional racially-animus purpose in approving the Sodus II property transfer to the Eau Claire District, which would have had a segregative impact on the Benton Harbor district.

These actions, over a course of several years, perpetuated racial isolation and separation within the public schools. Severe and unfortunate consequences have followed from this imposed segregation. Students have been given and denied education opportunities based on their race. The school district has been plagued with chronic developmental and achievement problems in most of their schools. This pattern of conduct and the results that followed set the stage for the exodus of white families from the district and attempted property transfers out of the consolidated district by white property owners. Today, Benton Harbor is a predominantly black school district in chronic need of assistance. Seven of the districts' 21 elementary schools and one of its junior high schools have in excess of

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<sup>5</sup> See, 442 F.Supp. 1280 (W.D.Mich., 1977).



98% black student enrollment.<sup>6</sup> Eleven of its 21 elementary schools and all three junior high schools are identified, based on fourth grade and seventh grade student performance on the most recent state-wide achievement tests, as schools with "high needs" in mathematics or reading and more frequently in both areas of achievement.<sup>7</sup>

In addition, the court found that the state defendants were aware as early as 1970 of racial segregation established in the Benton Harbor Public Schools. Information gained in State Board of Education hearings conducted on property transfers in 1971 and 1972 and through participation by the State Board on the "Blue Ribbon Planning Committee" in May and June of 1971 could only have added to their awareness of racially-motivated decisions and serious race related problems within the schools. In spite of this awareness, the state defendants failed to undertake any affirmative action to assist in desegregating these schools or to bring an end to race-based policy decisions within the district. By failing to act, the state defendants abandoned their statutory and constitutional roles and condoned segregative conduct within the district and assured continuing segregation and resulting loss of educational opportunities for black students. This inaction, the court found, was contrary to duties under the Michigan Constitution and laws and inconsistent with the State Board of Education's articulated policies on desegregation.<sup>8</sup> Failure to take steps to

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<sup>6</sup> Black, racially-identifiable schools within the Benton Harbor School District and their percentage of black enrollment in the 1980-81 school year are: Bard—99.7%, Boynton—99.9%, Calvin Britain—98.1%, Martin Luther King—99.2%, Morton—99.2%, Seely McCord—98%, Sterne Brunson—98.8%, and Benton Harbor Junior High School—98%. These enrollment statistics are taken from attendance data compiled in a district-wide count on October 3, 1980.

<sup>7</sup> This achievement information is taken from the most recent scores on the Michigan Educational Assessment Program 1980-81 (MEAP), Proportions Reports.

<sup>8</sup> On April 23, 1996, the State Board of Education and the Michigan Civil Rights Commission adopted a Joint Policy Statement on Equal-



remedy these problems has resulted in serious developmental damage to children within the schools.

The Berrien County Intermediate School District, as well, failed to satisfy any affirmative duty to act, to discontinue race-based, segregative policy decisions within the Benton Harbor District. The Intermediate District established a "Blue Ribbon Planning Committee" in May of 1971, to address the problems of violence and declining educational achievement in the Benton Harbor Schools. Ultimately the efforts and recommendations of that committee led to the creation of the "Redistricting Planning Committee." Both committees considered redistricting proposals which would have divided the BHASD into racially-segregated subdistricts and in the end would have resulted in the abandonment and isolation of the predominantly black central city area. Under supervision of the Intermedial District, the Redistricting Committee's report included recommendations of two racially-animiated and segregative redistricting plans. This report and the apparent Intermediate District support of it encouraged the hopes of white parents and property owners whose purpose was to fragment the district along racially-grouped residential lines. The Intermediate District never acted to communicate the constitutional limits to any policy decisions or conduct related to redistricting.

In addition, the Intermediate District, after a hearing held in April of 1973 on the Sodus II property transfer, voted to grant that transfer. If this transfer had been implemented, the predominantly white southern peninsula of the Benton Harbor district would have been transferred out of the district and attached to the Eau Claire School District. The property transfer was also approved by the State Board of Education, en-

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ity of Educational Opportunity. This Joint Policy Statement was reaffirmed by the State Board of Education in 1973. The Statement is reproduced in the court's opinion in *Oliver v. Kalamazoo Board of Education*, 346 F.Supp. 766, at 776 (W.D.Mich.1973).



joined by this court and consequently never realized. The court found that the transfer would have had a segregative impact on the district and found that the Intermediate District, aware of this fact, acted with a segregative purpose in granting the petition.

Likewise, the court found that both Coloma and Eau Claire undertook to support and accomplish transfer of contiguous white residential areas from the BHASD to their own white, rural districts. Coloma participated in 1970 and 1971 in the process that led to the successful transfer of the Eaman residential area, in the northwest corner of the Benton Harbor School District. The Eaman area was transferred out of the Benton Harbor district and has been a part of the Coloma district since 1971. In 1973, Eau Claire invited annexation of the Sodus area, the southern portion of the BHASD, to its school district. The court found that both of these property transfer efforts were products of racially-inspired plans and policies within the Coloma and Eau Claire school administration.

While Eau Claire's approval of the Sodus II transfer was considerably more open than the more subtle, behind the scenes conduct of Coloma related to the Eaman transfer, both efforts were found to be racially motivated. The Eaman transfer was successful and had a segregative impact on the BHASD by withdrawing 150 white students from the district. The Sodus II transfer was enjoined by the court. However, had it been successful, it too would have withdrawn white students from the Benton Harbor School system. In addition, Eau Claire accepted tuition students from Benton Harbor, a policy designed to prevent white students from being required to attend classes with increasing numbers of black students in the Benton Harbor system.

#### **SCOPE OF THE REMEDY**

Several alternatives are open to the court in forming a remedy for the constitutional violations that these three districts have been found to have committed. Within the plans that the



court has received, several options have been recommended to it. In at least two plans, experts have recommended that these three school districts be consolidated into one in order to achieve a sufficient amount of desegregation, to create learning opportunities that will remedy the losses that students have suffered and to lay a basis for improving the quality of education for the Benton Harbor area. Three other plans recommend that the Benton Harbor district alone be totally desegregated. Under the plan submitted by Dr. Michael Stolee, Dean of the School of Education at the University of Wisconsin, Milwaukee (the court-appointed expert), the Benton Harbor schools would be desegregated and in addition, these three local districts would participate together in establishing desegregated magnet programs open to students from all three districts, and encourage voluntary interdistrict transfers. This would encourage and provide the means for voluntary desegregation.

Judge Fox, in his November 8, 1979, opinion, adopted the recommendation found in the Candoli Plan and the Foster/Green Plan, both of which called for dissolution of the three independent school districts, followed by the complete consolidation of the three districts into one and elimination of all racially identifiable schools within the newly-created district. After this school desegregation case had been reassigned to me, in an order dated June 19, 1980, I stayed the order of Judge Fox in which he mandated a three district consolidation as a necessary part of any equitable remedy in this case. This court has since had the benefit of hearing testimony and argument offered by all parties, including Coloma and Eau Claire on the question of the "incremental segregative effect" of their segregative conduct on their neighboring school district.<sup>2</sup>

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<sup>2</sup> The Supreme Court has said in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, at 420, 97 S.Ct. 2766, at 2775, 53 L.Ed.2d 851 (1977) (*Dayton I*), that the extent of a defendant's participation in a desegregation remedy should be determined by "how much incremental segregative effect these violations had on the racial dis-



To begin with, I agree with several important findings discussed by Judge Fox in his analysis of the incremental segregative effect created by conduct of the Coloma and Eau Claire Districts. First, their segregative conduct had an effect on an already vulnerable school district. These effects went far beyond the removal of 150 white students from the Eaman area and 100 or more white tuition students from the Benton Harbor schools. Hopes and expectations created by the successful Eaman transfer out and attachment to Coloma contributed to a series of property transfer petitions by white property owners in 1971 and 1972. Parents began to conclude that their children's best interests would be served outside of the BHASD and believed that they could abandon the district with impunity and without responsibility for correcting behavioral and education problems plaguing the schools. Realistically, the incremental effect on racial segregation and existing educational problems cannot be quantitatively measured.<sup>10</sup> This court need not measure precisely the adverse effects that followed the Eaman transfer in order to conclude the results were devastating to the school district and to the quality of education it was able to offer. One school board member described the resulting chaos in the district as like "riding a moving iceberg as it fragmented beneath you."

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tribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy should be designed to represent that difference . . ." (Emphasis added)

<sup>10</sup> At least two district courts have rejected the "alternative universe theory" suggested by the discussion of "incremental segregative effect" in *Dayton I. See, Booker v. Special School District No. 1, Minneapolis*, 451 F.Supp. 659 (Minn.1978), and *Armstrong v. O'Connell*, 463 F.Supp. 1295 (E.D.Wis.1979). When factors such as housing, economic and employment discrimination, as well as conduct by school administrations, result in racial changes and racial isolation within an area, it is difficult, if not impossible, to separate each factor and measure precisely the extent of the impact or present effect of any one segregative action.



The evidence, however, does not warrant a finding that Coloma and Eau Claire were the exclusive or major contributors to the continuing situation of racial separation and chronic low achievement in the Benton Harbor district. The system-wide effects of the constitutional violations of the Benton Harbor district itself, the State Board of Education and the Superintendent of Education, and the Intermediate District all contributed to perpetuating racial isolation within the school district. I do agree with Judge Fox, however, that the practices and episodes in which Coloma and Eau Claire were involved added a significant "increment" to a situation that had a substantial segregative impact. I also agree with Judge Fox that it is unrealistic to believe that return of the Eaman area and Eau Claire's tuition students alone would give Benton Harbor back its lost stability or create educational opportunities that can remedy the losses Benton Harbor students have already suffered.

Any remedy that can be expected to work effectively and work immediately to correct the losses suffered by children in the Benton Harbor Schools must include the active participation of all three districts, based on their incremental contribution to school segregation and its related educational problems. However, an effective remedy need not compromise the autonomy of the three school districts. Under this court's plan, the boundaries of these separate and autonomous school districts will not be set aside. The remedy plan will include interdistrict cooperation in developing integrated magnet programs located in each school district and open to students from each of these districts. The court is confident that the remedial purpose of this plan can be achieved and the constitutional rights of the plaintiffs be vindicated without consolidation of these school districts.

Until the entry of final judgment disposing of this litigation, this court has the inherent power to correct any error in the findings of facts or decisions of the court in this litigation. *See, Jetfro Construction, Inc. v. South Memphis Lumber Company*, 531 F.2d 348, 351 (6th Cir. 1976). Consequently, the



findings of fact on the question of "incremental segregative effect" incorporated in this opinion complement and in the ultimate conclusion supercede decisions in the opinion issued by this court's predecessor in this case on November 8, 1979.

I do not disagree with Judge Fox's assessment of the seriousness of the conduct involved. Neither would I dispute his conclusion that under the principles articulated in *Milliken v. Bradley*, 418 U.S. 717, at 744-45, 94 S.Ct. 3112, at 3126-28, 41 L.Ed.2d 1069 (1974) (*Milliken I*) as applied to the facts of this case, the court has the authority to set aside the boundaries of these autonomous districts and consolidate them for remedial purposes. However, I am satisfied from the evidence that such extreme recourse is neither wise, necessary nor constitutionally mandated to achieve the remedial purposes of this plan.

Several considerations support this decision to not consolidate these three local school districts. First, the contribution of Coloma and Eau Claire to Benton Harbor's segregation and ensuing problems is significant, but is neither the exclusive nor primary cause of these problems. Secondly, the geographic structure of the area and the natural boundaries have the affect of dividing these three districts into separate, identifiable areas unrelated by any common pattern of interaction or any common governments.<sup>11</sup> Third, the tradition of local

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<sup>11</sup> The U.S. Supreme Court found in its opinion in *Keyes v. School District No. 1, Denver Colorado*, 413 U.S. 189, at 203, 93 S.Ct. 2686, at 2695, 37 L.Ed.2d 548 (1972) that a determination of state-imposed segregation and a substantial portion of a school district could support a finding of *de jure* segregation throughout the district. The Court, however, indicated that in some circumstances the physical and geographic makeup of an area might prevent a district court from applying this presumption.

"This is not to say, of course, there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance but such cases must be rare."



control over the operation of schools is deeply rooted in public education and is perceived as a unique characteristic contributing to successful public education in this country.<sup>12</sup> Preserving the autonomy of the districts and continuing local control of their public schools may in fact contribute to the practical success of this plan and to the quality of educational opportunities offered to students in all three districts.

Basic principles established by the Supreme Court guide this court in its responsibilities to formulate, adopt and implement a plan to remedy the conditions created by unconstitutional action and inaction of these defendants. These guiding principles are both simple and direct. The first, of course, is that principles of equity apply.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by facility for adjusting and reconciling public needs."

*Brown v. Board of Education*, 349 U.S. 294, at 300, 75 S.Ct. 753, at 756, 99 L.Ed. 1083 (1955).

The Supreme Court in desegregation cases has repeatedly emphasized that:

"The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Con-

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<sup>12</sup> The importance of local control over schools and children's education was emphasized by Dr. Herbert Walburg, Professor of Urban Education and Human Development and Learning at the University of Illinois, in his testimony on the issue of achievement motivation. Local control of schools has been identified as unique to the American system of public education and a significant factor contributing to success of public education. *See also, Milliken I*, 418 U.S. at 741-742, 94 S.Ct. at 3125-3126, "No single tradition in public education is more deeply rooted than local control over the obligation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."



stitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, 'as with any equity case, the nature of the violation determines the scope of the remedy.' "

*Milliken v. Bradley*, 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974), quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

Once invoked, however, "the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, *supra*, at 15, 91 S.Ct. at 1275.

Application of these equitable principles requires this court to focus on three factors.

"In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. [1] at 16, 91 S.Ct. 1267 [at 1276] 28 L.Ed.2d 554. The remedy must therefore be related to 'the condition alleged to offend the constitution . . . ' *Milliken I*, 418 U.S., at 738, 94 S.Ct. 3112 [at 3124] 41 L.Ed.2d 1069. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' *Id.* at 746, 94 S.Ct. 3112 [at 3128] 41 L.Ed.2d 1069. Third, the federal courts in devising a remedy must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution."

*Milliken v. Bradley*, 433 U.S. 267, at 280-281, 97 S.Ct. 2749, at 2757-2758, 53 L.Ed.2d 745 (1976) (*Milliken II*).

A three district remedy designed to achieve an established degree of racial balance in each school in these three local districts would be remarkably sweeping. In my opinion, the scope of such a remedy sweeps too broadly. Such a far reaching remedy imputes to school officials in Coloma and Eau Claire an intent far more pervasive than the evidence justifies.



In *Milliken I, supra*, 418 U.S. at 744-745, 94 S.Ct. at 3126-3128, the court described the nature and extent of constitutional violations that would warrant consolidation of separate school districts or imposition of an interdistrict plan for remedial purposes. The court said:

"Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts' racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."

Interdistrict violations with interdistrict effects of sufficient seriousness have been established in this record on liability to warrant interdistrict involvement in a remedy under this test. The actions of Coloma and Eau Claire not only contributed to segregation, they also contributed to disruption within the Benton Harbor District which rendered school officials unable to solve the racial and educational problems facing the district. Coloma's contribution to these problems, if measurable and if measured, would certainly be perceived as being greater than any incremental contribution made by Eau Claire school officials. The effect of any racially inspired conduct on the part of Eau Claire by school officials is diminished by the fact that the Sodus II property transfer was never completed. The successful Eaman transfer had a much more grave effect on the events that followed it than the aborted Sodus II transfer. This disparity in incremental contributions, however, exists not be-



cause of any different degree of racially inspired conduct in the two school districts, but because the Sodus II transfer was enjoined by this court.

Both districts participated in racially motivated planning that in one instance did and in the other would have, created opportunities for white property owners and students to abandoned the fragmenting iceberg. Violations by both school districts have had a clear, interdistrict effect. These constitutional wrongs call for an interdistrict remedy, but something less than consolidation of these three districts and less than complete desegregation in each district.

The extent of this three district remedy is appropriately limited by other factors that the court must consider, including the crucial importance of local control over public education. Local control has been identified as unique to American education and essential to continuing community contribution to the quality of education. Continued local control of Coloma and Eau Claire School will not only enhance the quality of educational opportunities for their students, but will also inure to the benefit of Benton Harbor students who participate in distinctive magnet programs established in this plan.

In *Milliken I, supra*, in discussing circumstances under which a federal court may order desegregation that includes more than one school district, the court cautioned against treating school boundaries as "no more than arbitrary lines on a map drawn for 'political convenience' ". The court said:

"Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright v. Council of the City of Emporia*, 407 U.S. 451, at 469 [92 S.Ct. 2196 at 2206, 33 L.Ed.2d 51]. Thus, in *San*



*Antonio School District v. Rodriguez*, 411 U.S. 1, 50 [93 S.Ct. 1278, 1305, 36 L.Ed.2d 16] (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' "

418 U.S. at 741-742, 94 S.Ct. at 3125-3126.

The condition that offends the Constitution here can be corrected without sacrificing the autonomy of Coloma and Eau Claire districts. In fact, the collective interests of all three districts may well be best served by the continued existence of these districts. The success of this plan turns on the resolve and the ability of these three districts to work cooperatively in creating opportunities for quality, integrated education for their students.

The court cannot be blind to the potential disruption of the entire educational process by an order overly broad, not warranted by the evidence, which in effect would destroy the existence of three lawfully-constituted school districts. I am satisfied that the great majority of black and white parents and children have no objection to integrated schools as such. All parents object strenuously, however, to a system that appears to use children as pawns to bring about desirable social and economic goals that adults have as yet failed to achieve; such as fair and equal housing, freedom of mobility, and equal employment opportunities. One need not be told by experts to know that our children's future economic success, happy, useful and worthwhile lives depend to a large degree on the quality of their education. Parents, black and white, unquestionably place achievement of their children in academically acceptable schools as their top educational priority. It is my hope and expectation that the court's plan will accomplish just that in a safe, harmonious, cooperative desegregated environment.

Two goals must be achieved to make the court's plan a success: (1) greater numbers of children in Benton Harbor must be educated in desegregated school environments; (2)



Benton Harbor children must be provided with increased opportunities for quality educational experiences with professional and compassionate assistance to enable them to improve their achievement motivation and task performance. The Benton Harbor, Coloma, and Eau Claire School Districts, the Berrien Intermediate School District, and the State Board of Education have each been sufficiently implicated in contributing to segregation and resulting developmental problems, that each entity must contribute actively to this court's conceived remedy plan.

## THE COURT'S DESEGREGATION PLAN

### *Introduction*

In February, 1980, this case was reassigned to me for formulating, adopting and implementing a remedy. Motions for reconsideration of the liability were filed by all of the added defendants and denied. In an opinion dated June 19, 1980, the court reaffirmed the findings and conclusions on liability as determined by Judge Fox. The court has since heard at least 27 days of testimony, including testimony of 9 expert witnesses, and has had the benefit of the parties' briefs and proposed findings of fact and conclusions of law on the question of an appropriate remedy. In addition, five different plans proposed to remedy the unconstitutional conduct of the defendants have been submitted to the court and have been the subject of testimony as well.

This opinion includes the court's desegregation remedy plan in which all defendants are directed and expected to participate cooperatively. The extent of involvement of each defendant is based on the nature and extent of its unconstitutional conduct and its adverse, segregative impact on the Benton Harbor School District. The court is of course guided in fulfilling its duties and limited in the exercise of its power to impose a remedy on any defendant by the mandate that the scope of the remedy not exceed the scope of the constitutional violation. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Austin Independent School*



*District v. United States*, 429 U.S. 990, 991, 97 S.Ct. 517, 50 L.Ed.2d 603 (1976) (Powell, J. concurring); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

The court has made every effort to remain faithful to this objective. In addition, the court is aware that the Supreme Court has directed district courts in school desegregation cases to determine how much "incremental segregative effect" each constitutional violation has had on the racial distribution of the school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy then must be designed to redress that difference in racial distribution. See, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, at 420, 97 S.Ct. 2766, at 2775 (1977) (*Dayton I*). It is apparent, however, that precise measurement of the incremental contribution of each defendant to segregation and its resulting problems in the Benton Harbor schools is impossible. However, the extent of involvement of each defendant in the remedy has been tailored, as closely as possible, to the extent of the impact of their unconstitutional conduct on the Benton Harbor School District.

This is an equitable remedy. Therefore, it follows no hard and fast established rules. Of necessity it is a product of judicial judgment. It is a plan that has emerged after careful and thoughtful analysis of the evidence. It is intended to be practical and fair. It is not intended to be punitive. It is conceived as a plan designed to work effectively and immediately to correct an unfortunate situation caused and contributed to by conduct in violation of the Fourteenth Amendment.

This plan has not been developed in isolation from the greater ongoing debates about educational benefits of court imposed school desegregation. The court is, of course, aware that scholars, members of Congress, and members of the Supreme



Court have engaged in public policy debates on the subject of court imposed school desegregation.<sup>13</sup> Many people question the proper limits of the role of the federal courts in confronting problems of public education. Criticism has been leveled at judicial approaches to desegregation which in many instances relied heavily on use of court imposed student transportation and establishment of precise racial balance in schools.

The plan, hereinafter detailed, uses transportation of students as a limited and necessary tool to achieve racial desegregation. The plan does not, however, rely exclusively on imposed racial balance in schools or on extensive transportation of children. In my judgment, those techniques alone will not solve the educational problems related to imposed racial separation and isolation in these three school districts. To some, the plan may be seen as going too far; to others not going far enough. It utilizes traditional desegregation techniques and some unique educational interventions as well. Very simply, it is designed to achieve two critical objectives: to enhance desegregation within the three local school districts and to improve academic achievement within the Benton Harbor schools without impairing the high standards already established in Coloma and Eau Claire. First, it creates opportunities for quality education in an integrated environment in each of these three local school districts. In some instances, use of that

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<sup>13</sup> Academic debate has intensified about the question of the extent of educational benefits realized by children as a result of integrated education. Researchers and writers find it difficult to agree on the effect of desegregation on black student achievement. See, Coleman, "New Incentives for Desegregation", 7 *Human Rights*, No. 3, at 10 (1978); Crane, R. and Mahard, R. "Desegregation and Black Achievement: A Review of the Research", 42 *Law and Contemporary Problems*, No. 3, at 17 (1978). See also, Justice Powell's dissenting opinion in *Austin Independent School District v. United States*, 429 U.S. 990, at 991, 97 S.Ct. 517, at 517, 50 L.Ed.2d 603 (1976); and *Columbus Board of Education v. Pennick*, 443 U.S. 449, at 479, 99 S.Ct. 2941, at 2987, 61 L.Ed.2d 666.



opportunity depends on the interest and initiative of students and parents. Secondly, it includes introduction of innovative educational programs designed to improve achievement motivation and performance within the Benton Harbor schools.

It is well established that successful public education depends to a large extent on family and community support for its effectiveness. When substantial elements of the community abandon their schools their quality diminishes. It is equally obvious that a child's enrollment is not determined by government policy or judicial order alone. It is as much determined by parental decision. If parents perceive court imposed educational desegregation as unfair or inequitable overreaching by the court, they will do all in their power to oppose it. Likewise, parents under such circumstances frequently resort to withdrawing their children from schools out of fear or resentment or a combination of both feelings.

These practical considerations have not traditionally played a role in the judicial task of formulating and adopting a desegregation remedy plan. However, they cannot be ignored by this court. The goal of creating desegregated educational environments, if they are to be lasting and conducive to quality education, must have the support of parents. Recognized studies indicate that parental support is the single, most important factor in contributing to children's scholastic achievement.<sup>14</sup>

To achieve desegregation and quality education, the school districts, the Intermediate School District, and the State Board of Education are directed to develop attractive incen-

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<sup>14</sup> The importance of the role of the parent in stimulating achievement was emphasized by Dr. Walberg in his testimony on the factors that contribute to achievement stimulation and achievement lag. There has been found a high correlation between the extent of emotional support from parents, parental interest in children's schoolwork, parental intellectual stimulation of children and a child's achievement and motivation.



tives to interdistrict transfers that will expand minority enrollment in Coloma and Eau Claire and enhance desegregation in all three districts. Distinctive and imaginative magnet educational programs will be used at all grade levels throughout the three districts as a primary incentive to interdistrict transfer.

In addition, joint three district wide community and parent involvement is encouraged in several particular components of the plan. The court has directed that a committee of educators, students, parents, and interested community members be established to review existing discipline codes in the three districts. This committee is directed to develop a uniform code of conduct and discipline. It is the court's opinion that clear and unambiguous statements of conduct expected and limits on behavior, as well as procedures for uniform discipline, is crucial to the students' perception of fairness in schools and ultimately to the success of interdistrict aspects of this plan. Within the Benton Harbor district, parent participation in school classrooms and extracurricular activity will be encouraged as a productive and necessary part of the achievement component of the plan. Finally, the court has established a Community Education Council made up of parents and concerned community members who are genuinely willing to support the desegregation effort that these schools are about to embark upon. The court seeks individuals willing to abandon fears and prejudices, willing to accept school desegregation and determined to make this plan for these districts a success. This group will play several roles including acting as liaisons from the community to the school boards and liaisons to the court reporting both successes and problems in implementation of the plan.

Parents and members of the three communities will be invited to attend public meetings where the components of the plan will be explained by persons who are familiar with its details. These opportunities for parent and community involvement will enable and encourage broad-based understanding of the processes and purposes of the court's plan. Communication among all elements of the community is crucial to



success of this plan. The plan will be widely explained to the end that people who understand it will support the school districts in their efforts to implement it.

An innovative and unique component of the plan is an achievement and social skills intervention to be implemented within the Benton Harbor school system. I realize fully that federal courts are not equipped with any particular competence in developing educational policies or long-term solutions to educational problems. However, my decision to outline in some detail the process of intervention in this area has been made deliberately. It is a decision necessitated by the existence of chronic achievement problems that the school district itself has been unable to address.<sup>15</sup>

This plan includes program components designed to generate community support, alter organizational features in schools involved, promote classroom innovations and enable individuals within the schools to change and adapt to racial changes in the schools and in their larger society. All of the components recommended in this plan have been features in at least one school system's desegregation plan or in one instance, in an inner-city achievement motivation project. Finally, each component offers considerable promise for helping to achieve desegregated education that benefits the students involved. In the end, the success of this effort depends on the resourcefulness and cooperation of persons within each of these three districts, in accepting desegregation and working cooperative-

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<sup>15</sup> The performance of fourth grade students on 1980 Michigan Statewide Achievement Tests indicate that at least 11 of the 21 elementary schools have "high needs" for improvement in achievement motivation and cognitive skills. Three of these 21 elementary schools have only kindergarten through third grade classes. No fourth grade achievement tests were given in those schools. All three junior high schools are identified as schools with "high needs", based on the most recent seventh grade performance on achievement tests. There is a high correlation between low achievement and racially-identifiable black schools.



ly to everyone's mutual benefit. If the communities and school districts are able to work cooperatively in implementing each component of the plan, the plan promises to work effectively and to work now.

### **INJUNCTION OF PROPERTY TRANSFERS AND TUITION STUDENTS**

The Eaman residential area which lies to the northwest of the Benton Harbor School District and has been part of the Coloma School District for the past ten years shall be transferred back to the Benton Harbor district. The small, four-room Eaman elementary school shall be returned to the Benton Harbor district as well. There will be no financial liability on the Benton Harbor district for purchase of this building. In addition, the defendant school boards and the State Board of Education are permanently enjoined and prohibited from initiating, encouraging, approving or granting a request for transfer of the Eaman area to the Coloma School District, or to any other school district.

Similarly, transfer of the Sodus II area, or any area of the Benton Harbor School District which includes any part of the Sodus II territory, is permanently enjoined. The defendants are enjoined and prohibited from initiating, encouraging, approving or granting a request for transfer of the Sodus II area out of the Benton Harbor School District to the Eau Claire School District or any other neighboring school district. In addition, the Eau Claire School District is permanently enjoined from receiving tuition students from the BHASD, except under the terms and conditions included in the interdistrict transfer aspects of this court's desegregation plan.

### **PUPIL REASSIGNMENT**

A complete desegregation plan must be implemented within the Benton Harbor school system. The court is not directing that the school district adopt and implement the court's recommended student reassignment plan. The court is, however, directing that the district adopt a student reassignment plan



that will eliminate racial identifiability of schools and achieve desegregation within all schools in the district. Any plan to be acceptable to the court must achieve the same, or a greater degree of desegregation as that achieved in the court's plan. In addition, the court recommends that the school district place a high priority on using a uniform grade structure which allows children in grades one through four to remain in the same school building. The school district should make every effort to use minimal additional transportation, without compromising the purpose of achieving desegregation.

Planning for student reassignment and transportation under an acceptable district-wide desegregation plan should be made the first priority of the Benton Harbor School District. Plans for student reassignment within the Benton Harbor District should be made by a staff team appointed by the superintendent, acting under the supervision and with the assistance of the court's representative. Their task should be completed and a plan for student reassignment adopted by the district by no later than May 12, 1981. The adopted plan must not be based on "phased in" desegregation. It must be fully put in place on the opening day of school in the 1981-82 school year.

Fundamentally, any effective desegregation plan must desegregate the schools and eliminate racial identifiability of schools. Once faculty reassignment has been accomplished, and the marks of a school's racial identification have been corrected, the racial composition of the student body remains as a critical identifying characteristic of the school.

Having found a history of segregative practices in the Benton Harbor district followed by a default within that district it is within the equitable powers of this court to use racial ratios as a starting point in formulating the remedy plan. *See, Swann, supra*, 402 U.S. at 24, 91 S.Ct. at 1280. Benton Harbor's school population of 9,100 is approximately 77% black, 22% white and 1% other minorities. Seven of its 21 elementary schools and one of its three junior high schools are racially identifiable as black schools. Each of these schools has a black student population that represent 98% or more of the school's



total enrollment.<sup>16</sup> At least three schools are identifiable as white schools by their pupil population alone.<sup>17</sup> The school district has not sustained its burden of showing, in the face of district-wide segregative practices, that any of these school assignments were genuinely non-discriminatory. Consequently, the racial identifiability of these schools must be eliminated as a part of this plan.

No fixed or undeviating degree of racial proportions of pupils in each school is required. The court has attempted to build in some flexibility in the use of racial ratios without compromising the purpose of achieving desegregation. However, the racial composition of the district as a whole provides a reference for determining what are or are not racially identifiable schools within the school system. A racially identifiable school is one that is substantially disproportionate in its racial composition when compared to the composition of the school district as a whole. *Swann, supra*, at 26, 91 S.Ct. at 1281.

Racial identifiability of schools must be eliminated as part of this plan in order to create an educational atmosphere where both blacks and whites are perceived as equal. This school district should strive to become a place where children, regardless of their race, are perceived and treated as equal in their status and in their ability to achieve. One-race schools are likely to be perceived by members of the black community as an affront. Racially identifiable schools perpetuate feelings of inferiority in one race and a perception among both blacks and whites that they are not, in fact, equals in the endeavors of public education.<sup>18</sup> These schools act as reminders of past segregative practices within the district. In addition, minority

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<sup>16</sup> See footnote 6, *supra*.

<sup>17</sup> Schools that are racially identifiable as white schools within the Benton Harbor School District followed by the percentage of their white student population are: Martindale—71.9%, Millberg—96.9%, and Pearl—65.4%.

<sup>18</sup> The Supreme Court long ago in *Brown v. Board of Education*, 347 U.S. 483, at 494, 74 S.Ct. 686, at 691, 98 L.Ed.2d 873 (1955)



students assigned to identifiably black schools are cut off from the majority culture which is widely reflected in standards both explicit and implicit, that determine success in our society. An individual may choose to separate himself or herself from the majority culture, but that separation should be chosen and not imposed by the public schools.

Inevitably the court's primary concern with desegregation conflicts with other legitimate concerns. The court has attempted to accommodate other important educational interests without compromising the principal purpose of achieving desegregation.

The court's recommended plan uses pairings and clusterings of elementary schools in order to eliminate racial identifiability of schools. Inner-city, predominantly black schools have been paired with schools that presently have larger white student populations, to create eight elementary attendance areas. Student reassignments are to be made by the school district within each pair or cluster to achieve desegregation in each school building and each classroom. The court recommends that three predominantly white elementary schools be closed and their students reassigned to achieve desegregation.

Feeder patterns to the junior high schools are adjusted to achieve better desegregation. The minority population in the predominantly black inner-city Benton Harbor Junior High School (presently 98% black student body) is reduced to 78.6% of that school's enrollment. In addition, it is recommended that the district discontinue the use of space within the Hull elementary building for seventh and eighth grade classes.

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(*Brown I*), identified the existence of one race schools and the exclusionary practices that create them as generating within black children "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."



There is one senior high school in the district. Consequently, all students within the system will attend the Benton Harbor High School.

The pairs and clusters in this plan have been drawn in such a way to minimize required transportation. However, given the location and capacities of existing school buildings and the racial concentrations of its population, it is impossible to achieve any meaningful desegregation of this school district without some mandatory transportation of its pupils. It should be remembered that transportation by bus has been commonly used within this school district since consolidation in 1965. It is not new to the district, nor is it a new experience for many of these children.

Attendance assignment in pairs and clusters allows people who come together in early elementary school, to remain together through their elementary and secondary education in the system. Opportunities for children to establish and maintain stable peer relationships is important to their personal development and to development of racial understanding. In order for children of different races to achieve mutual understanding and respect for one another, they must be brought together and allowed to continue to have contact with each other over a period of years, regardless of their residential neighborhood. Under this pairing and clustering plan, children who are brought together for grades one through four can expect to be assigned together to a second elementary school for grades five and six, to the same junior high school and finally to senior high school. Achieving this planned continuity will, of course, depend on whether the child and his family remains in the original, first grade neighborhood. While consistent continuity for each child cannot realistically be expected, it is nonetheless important to create the opportunity for children to develop and maintain stable peer relationships. This assignment plan will achieve that important purpose for at least some of these children.

With the elimination of the use of space in Hull elementary school for seventh and eighth grade classes, junior high feeder



patterns have been established to maintain a neighborhood pattern in junior high attendance as well. The district is divided into two junior high school attendance areas along an east-west access. Children from the northern half of the district attend the Benton Harbor Junior High School and those in the southern section of the district attend the Fairplain Junior High School.

Elimination of racial identifiability of schools can most simply and consistently be achieved by the school district by using a guideline based on the racial composition of the district as a whole. The court expects the school district to use the following guidelines for pupil reassignment in this or any other desegregation plan that it may adopt. The recommended limits on variation and racial population in each school is based on the percentage of black representation in the student population of the district as a whole. A constant increment of ten percent is used to define variation limits of racial composition in each school.

In the Benton Harbor district, based on the October, 1980, student attendance count, black students at all grade levels represented 77% of the total school's population. Thus, recommended limits for the percentage of black student population in each school building should be 67% to 87%. Under the court's recommended plan, most elementary schools would have black pupil attendance within a five percent deviation from the racial composition of the school district as a whole. The court emphasizes that this guideline for racial composition in each school is simply that, a guideline. The school district should keep this degree of racial mixing as its goal in any plan that it adopts. It is, however, not an inflexible, undeviating rule that must be applied in every instance. Exceptional circumstances occasionally can justify exceptions to pursuant of this goal. However, the goal remains.

Three elementary schools under the court's recommended plan have black populations that fall below the court recommended variation. These are Fairplain East with a 64.7% black



population, Hull School with a 60.3% black population and Stump-Nickerson School with a 44.1% black population.

The continued disproportionately low percentages of black student population in both Hull and Stump-Nickerson schools are acceptable because they result from an effort to accommodate other legitimate educational needs. It was difficult, if not impossible, to establish a uniform grade structure throughout the school district, given the location and capacity of existing school buildings without making some compromise in the degree of desegregation introduced into both of these schools. In my judgment, keeping students together through grades one through four in one school building for these crucial, early elementary years is important to their development and to activities and innovations expected to be introduced in the achievement component of the court's plan. I have recommended increasing the student-teacher contact in grades one through four to two years. Under the court's plan, this can be achieved. A uniform grade structure is used within the elementary schools in each pair and cluster with the exception of the Stump/Nickerson attendance area. In addition, the Stump/Nickerson school has a special education program and a facility designed for physically handicapped students. The court has avoided any disruption of this educational plan. These deviations from the court's established desegregation goals are legitimately warranted by these educational concerns.

### ***Elementary Pairs and Clusters.***

Table 1 shows how the elementary schools are paired and clustered under the court's plan to eliminate racial identifiability of schools within the school system. To accomplish this desegregation, eight attendance areas are created, including groups of two, three and four schools. Groupings of two or more schools in one attendance area are commonly referred to as a "cluster". Two 2-school pairings are made, three clusters of three schools, one cluster of four schools, and finally, two schools, Fairplain Northeast and Stump Nickerson are left to continue with their existing attendance area. Fairplain North-



east has a 74.1% black population which approximates the racial composition of the district and indicates the presence of an integrated neighborhood. The Stump/Nickerson school has a low black population (44.1%). However, it has been left intact to accommodate other educational needs. It has not been included in any pair or cluster under the desegregation plan to avoid disruption to students in its special education program.

Student reassignment to achieve acceptable racial proportions in each school will be done within each attendance area. For example, in attendance area number I, any student who lives within the present attendance areas for Morton, Northshore, Lafayette, or Eaman schools knows that he or she will attend first grade through fourth grade in the Morton school. These same students will attend fifth and sixth grade in either Northshore or Lafayette schools. No student in cluster number I will be assigned to a school outside of that cluster to achieve desegregation within the school district.

Under the plan, kindergarten classes are held in some fifth and sixth grade school buildings. This is done to avoid disruption to kindergarteners in the first year of school desegregation. Within the second and third year, under the adopted desegregation plan, kindergarten classes should all be moved into kindergarten through fourth grade school buildings.

**TABLE I**  
**Benton Harbor**  
**Proposed Student Assignments**  
**Elementary Grades**

Pair/Cluster	Capacity	Grades	Black	Non-	Total	%Black
				Black		
I.						
Morton	505	SP, K-4	320	101	421	76.1
Northshore	150	K, 5-6	97	38	135	71.9
Lafayette	190	SP, 5-6	72	23	95	75.8
Eaman*	100	CLOSE				



**TABLE I—Continued**

Pair Cluster	Capacity	Grades	Black	Non-Black	Total	%Black
<b>II.</b>						
Bard	375	SP, K, 5-6	177	64	241	73.4
Hull	725	SP, K-4	310	204	514	60.3
Martindale	240	CLOSE				
<b>III.</b>						
Johnson	225	SP, 5-6	128	46	174	73.6
Millberg	200	CLOSE				
McCord	615	SP, K-4	418	126	544	76.8
<b>IV.</b>						
Boynton	470	K-4	249	83	332	75.0
Pearl	150	5 & 6	115	36	151	76.2
<b>V.</b>						
Brunson	590	K-4	397	147	544	73.0
Fairplain East	390	K, 5-6	187	102	289	64.7
Sorter	440	K-4	298	111	409	72.9
<b>VI.</b>						
Stump-Nickerson	200	SP, K-3	37	47	84	44.1
<b>VII.</b>						
Fairplain NE	275	K-6	180	63	243	74.1
<b>VIII.</b>						
King	440	SP, K-4	291	44	335	87.0
Britain	495	1-4	301	53	354	85.0
Fairplain West	335	SP, 5-6	181	45	226	80.1
Fairplain NW	200	5 & 6	160	36	196	81.6
<b>TOTALS</b>			3,918	1,369**	5,287**	74.1

\* 1980-81 enrollment estimated to be 69 non-black, 0 black

\*\* Includes 69 students currently assigned to Eaman in the Coloma School District



These eight attendance areas are depicted graphically on a map of the Benton Harbor School District included in Appendix B at the conclusion of this opinion.

The principals of elementary schools within each cluster shall form a Principal Cluster Council. These councils shall meet monthly, in the first semester under the desegregation plan. Thereafter, they shall meet at least quarterly through the school year. The purpose in establishing Principal Cluster Councils is to provide opportunities for meaningful dialogue on problems related to desegregation.

### ***Junior High Feeder Patterns.***

Student assignment to junior high schools under the plan are shown on Table 2. Use of the Hull Elementary School facility for grades seven and eight is discontinued. Students who would normally attend Hull school for junior high school under existing attendance plans are reassigned to the Benton Harbor Junior High School. Each elementary pair or cluster is assigned as a unit to one of the remaining junior high schools, with the exception of the King/Britain/Fairplain West/Fairplain Northwest cluster. When these students reach junior high school age, children attending King and Britain schools will go to the Benton Harbor Junior High School. Fairplain West and Fairplain Northwest students will attend Fairplain Junior High School. Benton Harbor Junior High School will have an estimated 78.6% black student population and Fairplain junior high school a 68.8% black student population.



**TABLE II**  
**Benton Harbor**  
**Proposed Student Assignments**  
**Junior High School**

School	Capacity	Grades	Black	Non-Black	Total	%Black
<b>Feeder</b>						
Benton Harbor Jr.*	875	7-8	569	155	724	78.6
Bard						
Britain						
Hull						
Johnson						
King						
Lafayette						
McCord						
Morton						
Northshore						
Fairplain Jr. High*	640	7-8	426	193	619	68.8
Baynton						
Brunson						
Fairplain East						
Fairplain Northeast						
Fairplain Northwest						
Fairplain West						
Pearl						
Sorter						
Stump Nickerson						

\* Junior High population projected on a factor of 25.4% of elementary population

These junior high school feeder patterns are depicted graphically on a map of the school district included in Appendix C at the conclusion of the court's opinion.

### ***School Closings***

The court recommends that the school board close three elementary schools under the court's plan. In the 1980-81



school year, the school districts closed three elementary schools: Columbus, Sodus and Spinks Corner. Columbus was an inner-city school with an 84-year-old structure. Sodus and Spinks Corner were both small, rural schools at the periphery of the district that had suffered significant reduction in student enrollment in the 1970s and were operating at less than half of their full capacities at the time they were closed. Sodus was a three-room school in the farthest southern portion of the school district with approximately 30 students attending it. Spinks Corner was a one-room school on the far east end of the school district, with only 28 students attending it.

The court recommends closing of three additional schools. They are: Eaman, Millburg, and Martindale. Each one of these schools is racially identifiable as a white school, based on their student enrollment and faculty composition.<sup>19</sup> If these schools are closed, students from their attendance area can be reassigned in such a way to enhance the objectives of school desegregation.

Each of these three schools has a fairly limited capacity. Eaman is a small, four-room school on the farthest north end of the district, with a 100-student capacity. Since its transfer out of the district in 1972, it has been part of the Coloma School District. It has a 100% white student population. Millburg School is a 56-year-old school building in the northeast corner of the district. It has a capacity of 200 students, but is presently operating with an enrollment of approximately 80 students. Black children make up 3.1% of its student population. Martindale School is also a rural school, directly southeast of the Eaman School. Its capacity is 240 and it has been operating with an enrollment of approximately 195 students. Its black student population represents 28.1% of its total enrollment. Closing of these schools would be both cost effective, in reduc-

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<sup>19</sup> The Eaman Schools student population is 100% white, Millburg has a 3.1% black student population and Martindale a 28.1% black student population.



ing operating costs and serve the purposes of the court's desegregation plan.

### ***Transportation.***

The plan calls for transportation of approximately 2,500 students. The school district presently owns 32 buses. These vehicles can be used to transport students for the purpose of achieving desegregation. If the opening hour of elementary schools can be adjusted so that it is different from the high school opening time, some buses can be used for two pick-up and delivery runs each day. The pupil reassignment committee should explore the possibility of using an adjusted opening hour for elementary schools to make possible efficient use of the districts existing bus fleet. If adjusted opening hours for elementary schools cannot be used, pupil reassignment under this plan can be accomplished with the purchase of not more than eleven, 65-passenger buses.

Dr. Franklin H. Westervelt, Professor of Engineering and Computer Sciences and Director of the Computer Service Center at Wayne State University, has been appointed as the court's transportation expert. He will be available to the Benton Harbor School District to assist it in planning a transportation schedule that makes efficient use of the district's existing fleet of buses and minimizes the need to purchase additional buses.

If additional buses are needed to accomplish transportation under this school district's desegregation plan, the district shall promptly inform the court of the number of additional buses needed to be purchased and explain the reasons why the plan cannot be accomplished with existing buses, presently owned by the district.

### **MAGNET PROGRAMS AND INTERDISTRICT TRANSFERS**

The court has found that the State Board of Education, the Berrien County Intermediate School District, and the Coloma and Eau Claire School Districts have each contributed to racial isolation of students in the BHASD and to the problems related



to racial separation and isolation experience in that school system. These districts are obligated then to participate in a remedy that creates quality educational opportunities for their own students and Benton Harbor students in an integrated school environment.

A plan should be developed that includes a number of distinctive magnet programs designed to attract students from throughout the three school district area. These attractive educational programs should include opportunities for students at all grade levels from kindergarten through twelfth grade. The plan should advance the positive goal of improving the quality of education available to all children in the Benton Harbor, Coloma and Eau Claire schools, whatever their race or ethnic origin. The quality of the education experience available to students in these programs should be such that the plan will motivate and encourage voluntary transfer of students between Benton Harbor and Coloma and Eau Claire, in such a way that all three districts will be further desegregated.

Dean Michael J. Stolee, the court-appointed desegregation and education expert, has recommended that a committee be made up of the superintendents of the BCISD, the BHASD, Coloma and Eau Claire School Districts and a representative of the State Board of Education to begin planning immediately for implementation of wide-ranging programs that will facilitate voluntary pupil transfers between the three districts. I am directing that such a committee made up of these members be constituted immediately to plan and prepare programs, to the extent feasible, for the 1981 fall semester. The process of planning is undoubtedly complex and will continue into the new school year with the expectation that these programs will be expanded in the 1982-83 and 1983-84 school years.

It is impossible to predict to what extent planning will be completed and readiness will be achieved for implementation by the fall of this year. The court does not expect achievement of unrealistic or unattainable goals within a limited time. However, minimally, a three-district vocational, technical and



work-study program in cooperation with local businesses and industry should be established in the BHASD. Coloma and Eau Claire school districts are both directed to discontinue any existing interdistrict vocational educational programs with other school districts in order to enhance the success of the cooperative effort in vocational education with the BHASD. These three districts shall work together to solicit participation of area businesses and industry in a joint work-study program for the benefit of the high school students in the three districts.

The school districts are directed to employ teachers and administrators that are reasonably necessary to work on this joint planning process during the summer months. In addition, the State Board of Education shall contribute personnel to assist in planning and in the fall implementation of this component of the plan. The first task to be undertaken by this committee shall be the conducting of a needs assessment in the three school districts. This effort should identify the educational program needs and gaps in existing educational programs based on information from students, parents, educators and other residents. The committee should become familiar with magnet education programs used to compliment or motivate desegregation in other school districts such as Boston, Massachusetts; Dallas, Texas; Cincinnati, Ohio; and Milwaukee, Wisconsin. The committee shall explore the use of enriched educational programs in the arts, sciences and foreign languages at the elementary and secondary levels in this component of the plan. At the elementary level, the committee shall explore the use of the Montessori learning system in one or more elementary schools situated geographically to attract an inter-racial student population from more than one district.

Ultimately, the task of the Magnet Programs Committee is to develop quality, cooperative educational programs that will be attractive to students and their parents and to locate them throughout the three districts in such a way that black Benton Harbor students will voluntarily attend schools in Coloma and Eau Claire, and white students from the outlying, rural dis-



tricts will likewise be motivated to attend schools in the Benton Harbor district.

It is the court's expectation that 10% to 25% of the students attending magnet programs will be interdistrict transfer students, who by their race contribute to decreasing racial isolation in each school system. Seventy-five percent of positions in any magnet program should be open to students within the school district where the program is located.

The school boards jointly shall have the authority to employ consultants to assist and advise the Committee in the development, implementation, evaluation and continuing improvement of these distinctive education programs for the next two school years.

The committee shall establish and recommend to the school boards an annual calendar and daily opening and closing times for schools for the purpose of facilitating transfer of students among the three school districts. The court-appointed transportation expert shall make himself available to the committee to establish workable transportation arrangements for students attending schools in a district other than their residential district. Members of the committee should discuss and resolve questions such as scope of authority over programs, personnel and resources used in these distinctive magnet programs, division of responsibility and handling of financing and make recommendations on these issues to the school boards of each district. Joint school board decisions shall be reached on these issues. The court is concerned that education programs used in this component of the plan be perceived by the students, parents, teachers, and administrators as joint three-district-wide programs. To accomplish that end, some joint governing of these programs must be established, perhaps in the form of a joint committee with representation from each school board. The committee should recommend to the school boards an appropriate structure for joint governing of these magnet programs, that will include the involvement of all three districts in assuring the vitality and quality of these educational programs.



Decisions about the content and location of distinctive and attractive magnet programs to be included in the 1981-82 school year should be completed by July 1, 1981. A report including information on these magnet programs and any planning completed for the 1982-83 school year shall be submitted to the court, to the three school boards, the Intermediate School Board and the Community Education Council by July 1, 1981. Proposed literature explaining magnet programs and the process for electing participation in interdistrict programs should be included in this report and submitted to the three local school boards for their approval. The school boards should complete their review and comments on magnet programs and the accompanying literature by July 15, in order to allow sufficient time for the literature to be printed and prepared by the end of July. Clear and articulate information about magnet programs and opportunities for interdistrict transfer shall be distributed to all students and parents in the three districts by July 31, 1981.

Each school district shall designate one or more desegregation representatives to go to schools within its district and meet with students and parents to explain the content of the magnet program and the interdistrict transfer program and encourage students to participate in these educational opportunities. It is recommended that an individual with experience in elementary education or elementary school administration be responsible for this task within the elementary schools. An individual with similar professional experience in secondary education should be responsible to encourage student interest and participation in magnet programs and interdistrict transfers at the junior high school and senior high school levels.

### ***Interdistrict Transfers:***

In addition to interdistrict transfer for participation in attractive magnet programs, any student, at any grade level, who is a resident in the Benton Harbor School District shall be given an opportunity to elect to attend school in either the Coloma or Eau Claire District. Likewise, any resident at any



grade level, who is a resident in the Coloma or Eau Claire School Districts should be given an opportunity to elect to attend school in the Benton Harbor School District. The exercise of this choice should be limited to elections that will result in decreasing racial segregation in each school system. Educational and transportation costs related to the exercise of choice of interdistrict transfers shall not be borne by the student or parent or guardian of the student involved, but shall be paid by the state and the district as stated below in the section of this opinion which discusses allocation of financial responsibility for this desegregation remedy.

***Exercise of Choice:***

The period for exercising a choice to participate in either of these programs in the 1981-82 school year shall begin on August 1, and end on August 20, 1981. In future years, the period for exercising choice to participate in a magnet program or to attend a school in another school district, under this plan, shall begin no later than May 1 and shall be open for one month, in the school year preceding the year for which the choice of attendance is made.

No student who exercises his choice during the open period shall be given a preference because of the date within the period on which he or she exercised that choice. A failure to exercise a choice within the open period shall not preclude any student or parent from exercising a choice at any time before the opening day of school for the year for which the attendance choice applies. However, the preference of any student exercising a late choice may be subordinate to the choices of students made before the expiration of the spring open choice period.

Public notice of the open choice period shall be published conspicuously in at least three newspapers of broad circulation within the three district area. This notice shall be printed at least three times in each newspaper, within the 30 days immediately preceding the beginning of the spring open choice period. Published notice shall explain the content of distinctive



and attractive magnet programs. In addition the notice shall explain the fact that the opportunity is open to students and parents in the three districts to elect to attend or send their child to attend any of the magnet programs or exercise the choice of interdistrict transfers to schools where a student, by his or her race, will contribute to desegregation of the school population. The notice shall state clearly that any educational or transportation costs connected to interdistrict transfer or attendance in a magnet program will not be borne by the student or parent or guardian of the student. The deadline for exercise of such attendance choices shall be conspicuously stated, with a statement that choices may be exercised until the opening day of school, but that a choice made beyond the deadline may affect the preference of the student for a magnet educational program, should the program be full.

No interdistrict transfer made by a student under this plan to a district other than the district of his or her residence will jeopardize or adversely affect the eligibility of that student to participate in interscholastic athletics. Once a student has elected an interdistrict transfer, if he or she should return to the home school district, that student's participation in interscholastic athletics shall likewise not be affected by that decision. This information should be included in any literature distributed to students and parents describing opportunities to participate in magnet programs and interdistrict transfers under the court's plan.

#### ***Superintendents Council.***

In order to assure communication among the school administration of these three districts, the superintendents of Benton Harbor, Coloma and Eau Claire shall form a Superintendents Council. This council shall meet at least monthly through the first year under this desegregation plan. These meetings will provide opportunities for meaningful discussion, at the highest level within the administration, of problems related to desegregation and interdistrict aspects of the plan. This dialogue among superintendents should include ongoing planning, dis-



cussion of constructive and cooperative solutions to problems in order to prevent repetition of problems relating to desegregation in the schools.

Each superintendent will be responsible for the safety of students who transfer into his school district under this desegregation plan. These superintendents should work together to devise plans that will prevent threats to the personal safety of any child participating in an interdistrict transfer program.

Dr. Stolee will be available to attend Superintendents Council meetings, to consult with and advise superintendents in solving problems that arise in the course of this desegregation process.

### ACHIEVEMENT AND SOCIAL SKILLS

The problem of most concern to the court in addition to the racial separation and isolation of large numbers of children in these three school districts is the chronic low achievement levels of students in the Benton Harbor School system. At least 11 out of 21 elementary schools and all of the three junior high schools in the district have been identified by students performance on the 1981 state-wide achievement tests as having "high needs" in at least one, and more frequently in both, of the areas tested, i.e., reading and mathematics. These facts paint a picture of a school district in desperate need of assistance.

Dr. Stolee, the court's appointed expert, has recommended to the court that its plan include a program to improve the quality of instruction provided to students in the Benton Harbor School District and to raise the level of student achievement, until achievement within the district reaches the average attained by Michigan students in the Michigan Educational Achievement Program (MEAP). Establishment of an achievement component in the Benton Harbor schools is crucial to any complete and effective remediation of harm that has resulted from defendant's unconstitutional segregative conduct. This aspect of the court's plan is important to a complete remedy in



at least two respects. In its findings on liability, the court concluded that system-wide segregation, such as the Benton Harbor district has created and the State Board of Education condoned and perpetuated by its inaction, results in measurably reduced achievement.<sup>20</sup> In addition, of course, student achievement levels in the Benton Harbor district become particularly important in any voluntary desegregation plan. If Benton Harbor schools are going to attract students from Coloma and Eau Claire the schools must offer quality education and an atmosphere conducive to productive educational achievement.

Experts in education recognize that certain innovations in curriculum and in interpersonal relationships within the classroom exist and have been used successfully in other communities to reverse developmental and achievement lag. The court received testimony from Dr. Martin Maehr, Director of the Institute for Child Behavior and Development at the University of Illinois at Champagne, on the question of positive classroom intervention for the purpose of remediating damage to social and psychological development in a child.<sup>21</sup> In addition,

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<sup>20</sup> The court in its Phase I opinion on liability said: "Segregated black children tend to infer that they are isolated from the white majority because of their race, and, drawing on the observations of the deprivations experienced by black adults, they also tend to infer their own potential as limited because of their race. It is not surprising that black children have evidenced reduced self-esteem in a segregated environment and concomitant diminished motivation to succeed. The culturally-induced lack of self-esteem and diminished motivation in turn operate to measurably reduce achievement." See, *Berry v. Benton Harbor*, 442 F.Supp. 1230, at 1289 (D.C., 1977).

<sup>21</sup> Research and writing on the issue of classroom interventions designed to improve self-esteem and achievement motivation include the following: Aronson, E., Stephan, C., Sikes, J., Blaney, N., and Snapp, M., *Cooperation in the Classroom*, Beverly Hills: Sage Publishing Company (1978); Asher, S.R., "Children's Peer Relations", in M. E. Lamb, Editor, *Social and Personality Development*, New York: Holtz, Reinhart and Winston (1978); Atkinson, J.W. and



Dr. Herbert Walberg, a professor of urban education and human development and learning at the University of Illinois at Chicago Circle, has testified to similar classroom interventions that have improved achievement motivation in children. Effective classroom techniques that will improve achievement and task performance in children should be designed and put in place in the Benton Harbor Schools. These interventions should be aimed at improving self-esteem, achievement, motivation, social skills, coping, behavior, and vocational and career awareness in students at all grade levels.

This component will be entitled the Social Skills and Achievement Component of the court's plan. It shall be developed, implemented and evaluated by the school boards and the school district superintendent, under the supervision and with assistance from Dr. James P. Comer, of the Yale University Child Study Center. The court cannot emphasize too strongly, the critical importance of this component to a complete equitable remedy of the adverse effects of defendant's segregative conduct. The court expects the full cooperation of all staff and administration in the Benton Harbor School System working toward success of this intervention project. In addition, the court expects cooperation and assistance from the State Board of Education, and the Berrien County Intermediate School District in this venture.

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Raynor, J. O., Editors, *Motivation and Achievement*, New York: Wiley (1974); Carfield, J. and Wells, E.C., *100 Ways to Enhance Self Concept in the Classroom*, Englewood Cliffs, New Jersey: Prentice Hall (1978); Dweck, C.S. and Reptuci, N.D., "Learned Helplessness and Reinforcement Responsibility in Children", *25 J. of Personality and Social Psychology*, 109 (1973); Johnson, D.W., and Johnson, R., *Learning Together and Alone: Cooperation, Competition and Individualization*, Englewood Cliffs, New Jersey: Prentice Hall (1975); McClelland, D.C., *The Achieving Society*, New York: Free Press (1961); Purkey, W., *Inciting School Success: A Self-Concept Approach to Teaching and Learning*, Belmont, California: Wadsworth (1978).



These innovative efforts designed to remedy developmental harm may be extremely difficult and in some instances children may require one-on-one contact to achieve positive changes. The nature of the program will be determined by an assessment of the nature and extent of the damages, the obstacles to effective learning and achievement and the needs identified in the schools. The very sensitive areas of human development involved will require a high degree of competence in the staff members with responsibility for this component.

If these children have learned to believe that their situation in school or in life is hopeless, efforts in this component should try to teach them that there are opportunities for them and to believe in themselves as capable of operating effectively in new experiences. Before children can achieve and operate effectively, they must perceive themselves as capable of doing things if they try. That things are worth doing. That there are possibilities and opportunities open to them where they can achieve and succeed.

This component should begin with an evaluation of the Benton Harbor School System using diagnostic techniques, achievement testing, and classroom observation. Evaluators and teachers together should identify obstacles to effective learning and achievement and needs of students and faculty which must be met in order to overcome these obstacles.

The existence of these developmental and achievement problems demonstrate the destructiveness of negative racial attitudes and the severe impact on children and the quality of their lives that result from racial isolation that is not chosen but is imposed. These problems are undoubtedly complex. Consequently, it may take several years of dedicated work by competent professionals to improve achievement and performance levels in children in the Benton Harbor Schools. The court does not intend to put a fixed limit or termination date on the activity connected with this component. The court will retain jurisdiction to supervise the progress and problems in this component and reserves the right to make additional orders



related to this achievement component as required to fully effect a complete, equitable remedy. The goal of persons working within this component will be to raise the level of student achievement, until achievement within the district reaches the average attained by Michigan students in state-wide achievement tests. Once that goal has been achieved, the program will be phased out over two additional school years.

The court has become familiar with the successful work of Dr. James Comer dealing with developmental and achievement problems in two inner city elementary schools in New Haven, Connecticut.<sup>22</sup> Dr. Comer is a professor of psychiatry at the Child Study Center of Yale University, and Associate Dean of the Yale University Medical School. Together with a staff of professionals, he has conducted a project in the Baldwin and King elementary schools in the inner city of New Haven, Connecticut, beginning in 1969. The project has been funded by a Ford Foundation Grant and Title I funds granted to the New Haven Public School System. Baldwin and King Schools are both predominantly black inner-city schools, that fell 33rd and 32nd in achievement levels among the 33 elementary schools in New Haven. After several years of involvement by the Yale Child Study Center team, achievement in these schools had improved to the extent that students in these schools scored the highest achievement scores of the 22 inner-city schools within the city.

The Baldwin-King intervention has been based on the premise that application of behavior sciences in schools and to

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<sup>22</sup> Interventions used in this project and identified as having resulted in improved behavior and task performance in the children in these elementary schools are described in Comer, "Improving the Quality and Continuity of Relationships in Two Inner-City Schools," 16 *Journal of Child Psychiatry*, No. 3, at 535 (Summer 1976), in Comer, "The Education of Inner-City Children", 3 *Grants Magazine* No. 1, at 20 (March, 1980), and in Dr. Comer's recently published book, *School Power: Implications of an Intervention Project*, New York: Free Press (1980).



classroom problems can create a social environment where children will learn more effectively and be motivated and able to achieve. The program has focused on efforts to improve the quality of relationships within the schools and to address developmental needs of children. The project staff found that behavior and developmental problems are soon experienced by children as academic failure. This failure leads to student frustration, anger, conflict, self-doubt, withdrawal and poor achievement. Improvement in the quality of relationships within the schools and increasing the period of contact between teacher and child to two years were seen as extremely important aspects of the program, resulting in the greatest improvement in behavior and task performance in the children.

Because of his exceptional success with similar problems in the New Haven School System, I have invited Dr. Comer to serve as a consultant to the Benton Harbor Area School District School Board in the area of social skill and achievement development. He has advised the court of his interest and willingness to participate in this undertaking. He intends to make an exploratory trip to visit the school district before the end of this school year. I have every confidence that Dr. Comer is qualified to undertake the task of developing a social skills and achievement component of this remedial plan. In addition to his competence, I believe that he will be able to establish a high degree of trust with the Benton Harbor School administration, staff, parents and students.

Dr. Comer will be responsible for working with the school district in developing, implementing, and finally evaluating, a social skills and achievement component of the court's plan. The threshold task for Dr. Comer will be to conduct an evaluation of the elementary schools and junior and senior high schools in the Benton Harbor School System. This evaluation process should use diagnostic techniques, achievement testing and classroom observation. Teachers should be given adequate release time to discuss with members of the evaluation team their perceptions of problems and student and teacher needs within the school system. He is encouraged to use any staff



reasonably necessary to conduct a comprehensive evaluation, including qualified graduate students. An evaluation report and recommendations for an intervention program should be submitted to the court, the school board and the Community Education Council by November 1, 1981. Recommendations in this component should include plans, if appropriate, for coordination of this component with in-service training workshops and with the work of the in-service team in the schools.

The program shall begin no later than at the beginning of the second semester of the new school year. Dr. Comer will participate in the process of staff hiring for this component, in cooperation with the superintendent and members of the Benton Harbor School Board. In addition, he will act as a consultant to the social skills and achievement team and evaluate the performance of the team, reporting to the school board and the court on the accomplishments and problems of this component at the end of each semester.

In an effort to encourage and enhance the healthy cognitive, social and psychological development of children in the Benton Harbor schools, the court recommends to the school board that students entering grades 1, 2 and 3, in the next school year, remain with the same teacher through the 1982-83 school year. There are, of course, benefits and negative aspects to children remaining with the same teacher for a two-year period. However, the court is confident that the benefits gained from this change will outweigh any problems that it might create.

Among experts in the area of child development, it is recognized that the healthy, cognitive, social and psychological development of a young child requires affection, stimulation of inherent potential and continuing contact with a mature adult.<sup>21</sup> By increasing the period of contact between teacher and child to two years, teachers will have a greater opportu-

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<sup>21</sup> See, Bowlby, J., "The Purpose of the Family", in *Maternal Care and Mental Health*, Geneva: World Health Organization at pp. 67-71 (1952), cited in Comer, *Journal of Child Psychiatry*, *ibid*.



ity to achieve more than superficial insights into the personal needs and problems these children are experiencing. This should facilitate early identification of and attention to children who are at high risk of suffering academic failure. In the course of two years, teachers should have more opportunities for contact with parents. These contacts should be used by teachers to consult about children's needs, to develop better relationships with parents and to encourage parents' participation in the classroom, extracurricular activities, and school events. Parent cooperation with the school staff is crucial to stimulating achievement and for mutual understanding of problems and opportunities to meet responsibilities to these children. Finally, two years spent with one teacher will eliminate the separation anxiety that young children experience at the end of the school year. Basically a greater understanding of and involvement in a student's life can be expected from spending two years with a child. In addition, the child's bond with a teacher may become more firmly established. Because of the importance of this relationship to the child's development and the advantages of increased student-teacher contact, I am directing that the school board, in establishing pairings of inner-city, predominantly black schools with white, outlying schools, place a high priority on structuring clusters and school assignments in such a way that students will spend four years in grades 1 through 4 in one elementary school.

Inclusion of this achievement component is consistent with the basic rule that where constitutional violations have been found, the remedy should be tailored to cure the "condition that offends the Constitution". *Milliken I, supra*, 418 U.S. at 738, 94 S.Ct. at 3124 (emphasis added). The "condition" offending the Constitution in Bentor Harbor Schools is *de jure* segregation in the school system. This substantial and continued segregation has resulted in more than the physical separation of children of different races. The need for improvement in achievement motivation and academic performance flows directly from the constitutional violations by both state and local officials in their action and inaction. This achievement



intervention is necessary to restore victims of discriminatory conduct to the position that they would have enjoyed in terms of educational opportunities and performance had attention to their needs been provided in a nondiscriminatory manner, in a school district free of *de jure* segregation.

Educational and achievement opportunities in segregated schools have long been recognized as "inherently unequal". *Brown v. Board of Education*, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873 (1954) (*Brown I*). The Supreme Court has approved inclusion of education intervention to overcome the effects of a segregated school system in a desegregation remedy plan. See, *Milliken v. Bradley*, 433 U.S. 267, 279-288, 97 S.Ct. 2749, 2756-2761, 53 L.Ed.2d 745 (1976).<sup>24</sup>

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<sup>24</sup> The court in *Milliken II*, cited with approval several decisions of the Fifth Circuit Court of Appeals which upheld the inclusion of remedial educational intervention as parts of desegregation remedy plans.

In that opinion, the court said:

In 1967, the Court of Appeals for the Fifth Circuit, then engaged in overseeing the desegregation of numerous school districts in the South, laid down the following requirement in an en banc decision:

"The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to *overcome past inadequacies* in their education." *United States v. Jefferson County Board of Education*, 380 F.2d 385, 394, cert. denied, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104 (1967). (Emphasis supplied).

See also *Stell v. Board of Public Education of Savannah*, 387 F.2d 480, 492, 496-497 (CA5 1967); *Hill v. Lafourche Parish School Board*, 291 F.Supp. 819, 823 (ED La.1967); *Redman v. Terrebonne Parish School Board*, 293 F.Supp. 376, 379 (ED La.1967); *Lee v. Macon County Board of Education*, 267 F.Supp. 458, 489 (MD Ala.1967); *Graves v. Walton County Board of Education*, 300 F.Supp. 188, 200 (MD Ga.1968); aff'd, 410 F.2d 1153 (CA5 1969). Two years later, the Fifth Circuit again adhered to the rule that district courts could properly seek to overcome the built-in inadequacies of a segregated educational system:

"The trial court concluded that the school board must establish remedial programs to assist students who previously attended



## CURRICULUM

The goal of any successful desegregation plan must include not only physical contact between children of different races, but also active recognition and appreciation of the black man and woman's contribution to history, literature, science and the arts. Above and beyond this, curriculum in desegregated schools should encourage the equal status of black students and provide equal opportunities for them to achieve and succeed. This aspect of the plan suggests innovations in curriculum content and process to ensure that these goals are achieved within these three school districts.

Coloma and Eau Claire School Districts are directed to review and evaluate curriculum content, textbooks and teaching materials used in all classes at all grade levels within their school system. The purpose of this systematic evaluation is to ensure that curriculum content, textbooks and teaching mate-

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all Negro schools when those students transfer to formerly all-white schools . . . . The remedial programs . . . are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion." *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 831 (1969).

(Emphasis supplied.)

The Court went on to say:

In the 1970's, the pattern has been essentially the same. The Fifth Circuit has, when the fact situation warranted, continued to call for remedial education programs in desegregation plans. *E.g., United States v. Texas*, 447 F.2d 441, 448 (1971), stay denied *sub nom. Edgar v. United States*, 404 U.S. 1206, 92 S.Ct. 8, 30 L.Ed.2d 10 (1971) (Black, J., in chambers). To that end, the approved plan in *United States v. Texas* required:

"[C]urriculum offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation. . . ." 447 F.2d, at 448.

(Footnote omitted.)



rials are free of cultural bias and depict multi-racial roots and contributions to American society. Where curriculum and materials fall short of meeting the goal of offering an education which provides a multi-racial perspective of American society, recommendations for change should be made.

The superintendent of Coloma and Eau Claire School Districts are directed to prepare a report including identification of any changes in curriculum, textbooks and/or educational materials recommended and implemented as a result of this curriculum evaluation. These reports should be submitted to the respective school boards of each district by October 15, 1981.

Both Coloma and Eau Claire School Districts are directed to adopt an affirmative education policy that textbook selection at all grade levels be monitored and approved for lack of racial bias and depicting black participation in all aspects of American learning, society and culture.

In each high school in these three local school districts, the curriculum shall include an annual elective course on American race relations. Each course should include reading, discussion and study of the history of race relations in this country and efforts to improve relationships between the races. Additional opportunities to study black literature, history, music, and art should be available in separate courses or included within existing course offerings at the high school level at each district. In addition, the court recommends that study of minority cultures be included in curriculum at all grade levels throughout these three school districts.

Extracurricular activity in each district should reflect the presence and cultural interests of black students within the study body. Plays, music concerts, dances, extra-curricular trips, and classroom guests should all reflect appreciation for black culture and the achievements of black persons.

Curriculum process is equally important to the success of this desegregation effort as is curriculum content. Teaching



methods should be used to encourage positive interpersonal relationships and cooperation in integrated classrooms. Teachers should be encouraged and reinforced for developing social conditions within their classrooms that support the equal status, anxiety-free interaction, mutually-dependent and task productive contact between children of different races. This kind of educational environment can be achieved by instructing students to participate in interdependent work on tasks with group rewards for a cooperative and successful work product. Principals in each school shall be responsible for assuring that teachers are made aware of and encouraged to read about and experiment in their classrooms with techniques that place students in situations that produce and maintain a perception of equality with students of other races.<sup>25</sup> Teachers should be encouraged to share ideas and reports of classroom experiences with experimental techniques used to encourage equal status interaction and conflict-free interaction between children of different races. Teachers should be permitted opportunities to work jointly on implementing cooperative, interdependent tasks in their classrooms under this section of the plan.

Teachers should be encouraged to report to their school principals, district superintendents and share with the Community Education Council their observations of student interaction and experiences in using innovative techniques in their classrooms under this section of the plan.

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<sup>25</sup> The court recommends to the principals in the Benton Harbor school systems two articles which review experiments in instructional techniques used in inter-racial classrooms. Cohen, Lockheed and Lohman, "The Center for Interracial Cooperation: A Field Experiment," 49 *Soc. of Educ.* 47 (1976) and Luckier, Rosenfield, Sikes and Aronson, "Performance in the Interdependent Classroom: A Field Study", 13 *Am. Educ. Research J.* 115 (1976). Both articles are cited and discussed in Chesler, M.A., Crofoot, J.E., Bryant, B.I., "Institutional Changes to Support School Desegregation: Alternative Models Underlying Research and Implementation", 42 *Law and Contemporary Problems*, 174, at 203 (Autumn 1978).



## **ADMINISTRATIVE, TEACHER, AND STAFF REASSIGNMENT AND AFFIRMATIVE ACTION**

Faculty reassignment shall be used in two ways under the court's plan. First, Benton Harbor School District shall completely desegregate its faculty in each school building. Neither white teachers nor black teachers shall be isolated in any school within the district. No school shall retain any indicia of racial identifiability by the racial composition of its faculty. Secondly, two-year interdistrict transfers of black teachers from Benton Harbor shall be used to create immediate desegregation of the faculty in the Coloma and Eau Claire school districts. After two years, each of these school districts is expected to have accomplished significant affirmative action hiring within its district. While the integrity of each district must remain intact under the court's plan, there is no reason why teachers may not and should not be reassigned among the districts to achieve desegregation of school faculties.

### **I. Benton Harbor**

Hiring and assignment of administrative, faculty and staff support personnel shall reflect a commitment to desegregation within the Benton Harbor School District. Each school building within the Benton Harbor system should have a desegregated faculty, which in its racial balance reflects the racial makeup of the total school system faculty population.

#### ***Teachers.***

Integrated faculties within each school should operate as an advantage for both faculty members and students in adjustment to desegregated education. Faculty integration within each school contributes to effective and successful desegregation in at least two respects. First, teachers have the benefit of the opportunity to share ideas, perceptions of race related and achievement problems, and advice on creative classroom interventions with colleagues of both races. This opportunity should be used to obtain greater understanding and insight into problems children experience in adapting to a desegregat-



ed school environment. In addition, a desegregated faculty provides students with the benefit of both black and white role models within their schools and the opportunity to observe adults involved in interracial relationships and cooperative efforts to achieve common goals.

Reassignment necessary to achieve racial balance within each school can be accomplished without a great deal of disruption by using the following means. First, teachers in schools that are closed under this plan should be reassigned in such a way that they promote racial balance in other schools. Second, attrition of teachers leaving the school system should be used in such a way that newly-hired faculty enhance the racial balance in the schools. Third, a list of volunteers for reassignment should be prepared by the superintendent and needed reassignments should be made from that list. Teachers should be encouraged to volunteer for intra-district reassignment. The purpose of the reassignment plan and benefits of racial balance among faculty members within each building should be explained to teachers in an effort to solicit their voluntary cooperation. Teacher assignments within each school should approximate the racial composition of the faculty for the whole school district.

In addition, volunteers from among black teachers should be solicited and encouraged for interdistrict reassignment to Coloma and Eau Claire to facilitate student acceptance of and adjustment to desegregation and to achieve integration of the faculty in those school districts. This aspect of the plan is discussed further in the section below on Coloma and Eau Claire teacher reassignment.

### ***Administration.***

Only five of 16 principals in the Benton Harbor school system are black. The court recommends that, in order to facilitate effective desegregation within the system, vacancies in principal positions be filled in such a way that at least 50% of these administrative positions are eventually held by black professionals. This will assure that a black voice and a black perspec-



tive on school problems is heard within the administration. In addition, it will avoid identification of the chief building executive position as a position that is preferably held by white persons.

***Staff:***

Other professional staff and nonprofessional support staff positions within the school system are held by a disproportionate number of white people. Efforts should be made to increase black representation among school nurses, secretaries, and maintenance personnel. An affirmative action plan should be developed by the district that targets at least 50% black representation in these and other job categories where blacks have been under represented. No job category within the system should become racially identifiable.

The superintendent should report to the BHASD school board and the court-established Community Education Council (CEC), by September 20, 1981, the details of teacher hiring and reassignment done to achieve the goals established by the court in this component of the plan. The superintendent should as well prepare a report at the end of each school year on the progress of the district in achieving affirmative action goals established under the direction of this plan. This report should annually be submitted to both the school board and the CEC.

## **II. Coloma and Eau Claire**

In order to realistically attract students to take advantage of interdistrict transfer opportunities and distinctive magnet programs in Coloma and Eau Claire School Districts, there must be some black representation on the faculties in each of these school districts. New hiring and teacher reassignment should be used to achieve 10% black representation on the faculties within each of these school districts. If the faculties continue to be made up of all white teachers in each of these districts, students are less likely to feel comfortable and secure in choosing to take advantage of desegregated educational opportunities open to them under this plan in each of these



districts. Black teachers should be represented throughout all grade levels in both Coloma and Eau Claire School Districts.

This reassignment should be achieved initially by voluntary teacher exchanges and interdistrict transfers. Superintendents in each of these three local school districts should encourage teachers to volunteer for interdistrict reassignment. The purposes and advantages of desegregated faculties to the success of the total desegregation process should be clearly explained to teachers in an effort to encourage their cooperation in this aspect of the court's plan. Literature should be prepared by each district superintendent with the assistance of a court representative, before the end of the school year, to solicit voluntary interdistrict reassignment of teachers. Existing faculty, new faculty hiring and voluntary teacher exchange and interdistrict transfer should achieve the 10% goal for black teacher assignment to Coloma and Eau Claire in the 1981-82 school year. Voluntary teacher exchange between Benton Harbor and Coloma and Benton Harbor and Eau Claire supplemented by any necessary black teacher reassignment to Coloma and Eau Claire should be continued for two years. At the conclusion of two years, affirmative action hiring of black teachers in Coloma and Eau Claire should achieve 10% black teacher representation on the faculty in each of these districts for the 1983-84 school year.

Both Coloma and Eau Claire School Districts shall prepare as a part of their participation in this desegregation plan, an affirmative action plan which establishes goals for hiring within the next five years for each job category within their school districts. Both school districts shall prepare at the end of each school year, a report on their progress in establishing and achieving affirmative action goals, to be submitted to their respective school boards and to the court-established Community Education Council.

### IN-SERVICE

Desegregation of schools that have been predominantly white or predominantly black brings with it much more than



the physical movement of children and introduction of new classmates of a different race into a classroom. Emotional and psychological adjustments are going to be required of all members of the three districts affected by this court's desegregation plan. Implementation of district-wide pupil transfers in Benton Harbor and interdistrict programs are inevitably likely to cause some disruption and perhaps resentment. In addition, students and faculty who have spent most of their lives separated or isolated from members of the opposite race may bring with them fears, preconceived notions and attitudes toward members of the other race which could jeopardize their own personal adjustment to desegregation and success of the plan.

It is the responsibility of the school boards in each district to reassess their attitudes towards desegregation and to assure that their superintendents are committed to supporting desegregation and quality education in the interdistrict aspects of this plan. The superintendents in turn are responsible for assuring that their principals support the court's desegregation plan. It shall be made clear to faculty members in each district that there is no place within these districts for teachers who are not committed to desegregation in these public schools. The constitution requires that where there has been a history of segregative practices, and such a history has been demonstrated here, that desegregation must be achieved. Professionals working in public education are obligated to support desegregation that is introduced under these circumstances. There is no place in any of these districts for teachers who are not committed to remedying the constitutional violations that have been found by this court.

The organizational structures of the three districts may require modification to encourage and assure successful adjustment to desegregation. If a high priority is going to be placed on creating opportunities for black children to achieve and succeed, new organizational structures and rewards may need to be employed to encourage and reinforce new kinds of behavior. In a community where the development and achievement levels of black children have been allowed to lag, some



new dynamics must be introduced into the system to affect that lag in development. Attention must be paid to the needs of these children. Attention must be paid to the attitudes towards these children and to the degree of concern for, understanding of and perception into their problems, within the system.

This adaptation, examination of attitudes and behavior cannot be expected to come easily or automatically. Members of the school community are entitled to some assistance in understanding and coping with the new stresses and adjustments that can be expected to be introduced with desegregation.

To address this anticipated need, I am directing these three school districts to develop, participate in and finally evaluate an in-service workshop component of the plan. The joint School Boards will be responsible for articulating policy, consistent with this court's opinion, for a series of effective workshops. In addition, the school boards will be ultimately accountable for the quality of services delivered in this component. Program content and process should be recommended to the boards and ultimately developed and implemented by the superintendents of each school district acting cooperatively and in cooperation with the superintendent of the Berrien County Intermediate School District and a representative of the State Board of Education, with the assistance of appropriate staff or consultants.

In-service training workshops shall include mandatory participation by all members of the school districts, including: school board members, administrative personnel, faculty, all support staff and students. In addition, opportunities must be created for meaningful parent participation in workshops and their involvement should be actively encouraged.

The agenda detailed by the court in Appendix A includes opportunities for explanation of the court's plan and orientation to that plan for all members of the school community. These spring workshops are to be the beginning of the in-service component of the plan. Participation of skilled and qualified members of an independent in-service team should be



included in these orientation and workshop events. Participation by members of the school communities in at least one of these orientation workshops should be mandatory.

In addition, each school district is directed to prepare and implement three days of intensive faculty and support staff workshops to be conducted immediately following the last scheduled day of school in this school year. These workshops should include an opportunity for teachers to evaluate the content and process of the workshops. Thorough understanding by all members of the three district community of the components of the court's plan and clarification of the role to be played by administration, faculty, support staff and students should be a goal for each district to be met before the end of this school year. The summer should be used for planning agendas for in-service workshops to be conducted through the following school year.

Wherever possible, the three districts should work together and plan joint in-service events that include teachers and administrators from the three districts. These may be done in grade level groupings of teachers and principals, in smaller groups or in one-on-one classroom visitation days. Teachers should be given sufficient release time throughout the school year to engage in meaningful contact with teachers of other races to exchange perceptions of problems related to desegregation and ideas for effective intervention to address those problems in their classrooms.

Without intending to usurp the role of the school boards and administration in this component, there are several goals and objectives that should be identified which the court expects to be incorporated in workshops which the court is directing the districts to conduct. Several of these goals were originally recommended to the court in the Foster Green report. The district superintendents and chairmen of school boards as well as any members of any in-service planning committees should become familiar with recommendations made in that report, excerpts of which are attached to this opinion in Appendix D.



The overriding purpose and goals of workshops conducted as part of the court's plan is promotion of inter-racial cooperation and understanding within and among these school districts. The objective in conducting these workshops is to prevent legitimate fears and concerns from escalating into major conflicts that jeopardize adjustment to desegregation and success of the plan. Workshops should be seen as structured opportunities to communicate feelings and concerns related to the desegregation process, as well as occasions to gain insights and understanding that enable people to cope with this new experience and contribute to its success.

Participants in these workshops should: (1) examine their own values, attitudes and behavior toward members of other racial groups and the impact that these attitudes and behaviors have on development and academic achievement of students; (2) develop insights and skills necessary to deal effectively with conflicts related to racial desegregation and tensions between racial groups; and (3) increase their sensitivity and attention to the needs of children in their adjustment to desegregated classrooms. These goals are not intended to be exhaustive. It is the role of the school boards, acting in cooperation with the superintendents of these three school districts, with the assistance of the superintendent of the Intermediate School District and the State Board of Education, to develop policy, program goals and methods for implementation that will enhance adjustment to desegregation and success of the plan.

The leadership role of superintendents and principals in adaptation to and acceptance of desegregation should be strongly emphasized. In addition, each member of the faculty must understand the critical importance of parent participation in school activities and to the successful achievement of each child. Techniques that have been successful in achieving parent involvement and positive perceptions of schools on the part of parents should be explored and goals should be adopted by each faculty member to achieve that end.



Finally, the importance of the role of guidance counseling personnel and any psychologists or social workers on the staff of these districts should be impressed upon those staff members. These individuals should be included in three days of intensive workshops conducted at the conclusion of the school year, focusing on development of techniques which will prevent academic and social failure in desegregated schools. In addition, they should be prepared to assist teachers in early identification of problems in development and achievement lag and in designing interventions that constructively pay attention to the problems of students with high risk of social or academic failure. An achievement component of the plan will be developed to bring professional focus and assistance to correct the problem of developmental and achievement lag in the Benton Harbor School District. Staff guidance counsellors, social workers, and psychologists in the Benton Harbor Schools will be expected to cooperate fully with the persons responsible for developing and implementing that achievement component.

The school districts should engage the services of an independent team to consult on preparation of workshops and to conduct in-service workshops throughout the 1981-82 school year and for the following two school years. The team should identify persons on the school staff who may make a positive contribution to the in-service agenda and actively use those persons in conducting workshops. This inclusion of staff should be embarked upon with the intention that the in-service component of the program may become a self-sufficient program incorporated into the school's curriculum and staff development when the in-service team discontinues its involvement with the districts under this order.

The in-service team should be bi-racial and combine expertise and experience in the following areas: urban inner-city education, rural education, high school counseling, work with adults and children from different racial groups, social classes and cultural backgrounds and understanding of child development. In the Benton Harbor school system, members of the



in-service team are expected to work cooperatively with the persons responsible for the achievement component of the court's plan.

### DISCIPLINE

Students' perception of and feeling of fairness in the schools is absolutely critical to the success of this or any desegregation plan. Without clearly established standards of both expected behavior and unacceptable conduct an environment where students are treated fairly cannot develop. Some educators believe strongly that achievement is significantly related to perception of school fairness.<sup>26</sup> Consequently, the task of developing a clear and fair code of conduct and discipline is of special importance to the desegregation process and should be carried out early on in that process.

A good uniform code of conduct alone does not create an atmosphere of fairness within these schools. Enforcement by teachers and administrators on a day-to-day basis is equally important in creating a feeling of fairness in the students of these three districts. In desegregated schools it is not unusual that rules may be administered, inadvertently or deliberately, in a way that minority students may be caught and or punished more frequently and in different degrees than white students. Special attention should be paid by staff members in each of the three districts to their personal attitudes that may contribute to this potential problem, especially for interdistrict transfer students.

It has been recommended to the court in testimony at the remedy hearing that a bi-racial, representative committee of parents, students, teachers, administrators, and school board members and interested community members be established

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<sup>26</sup> See, Forehand, Ragosta and Rock, Conditions and Processes of Effective School Desegregation (Office of Education Reports No. ETS-PR-76-23, July 1976) (ERIC Document No. 131 155) Cited in "Alternative Models", *Ibid.*, at 181.



for the purpose of developing a uniform discipline code. It is the hope and expectation of the court in following this advice that the existence of clear, unambiguous and uniform standard of conduct and procedures for discipline will eliminate the interjection of personal bias and subjective enforcement that may be exacerbated by negative racial attitudes. In order to facilitate the three-district joint program in the court's plan there should be a high degree of consistency in expected conduct and in discipline codes in the three districts. Conduct expected of students and procedures for fair discipline should be understood by all administrators, teachers and students.

Consequently, I am directing the superintendent and the chairman of the school board in each district to appoint members to a 21-person, three-district committee on student conduct and discipline. The responsibility of this committee shall be to recommend to the school boards a uniform code of conduct and discipline for the three districts. Their report shall recommend clearly-established standards of expected behavior and unacceptable conduct, as well as clear and fair procedures of enforcement.

The committee shall be racially representative and include persons who are genuinely committed to the success of the desegregation effort. The committee shall be made up of the following representatives: (1) the principals of the senior high schools in each district; (2) a representative of the school board from each district; (3) four parents, including two from Benton Harbor and one each from Coloma and Eau Claire; (4) four teachers, including two from Benton Harbor, and one each from Coloma and Eau Claire; (5) three students, one from each school district; and (6) four interested community members, including two from Benton Harbor and one each from Coloma and Eau Claire. It will be the responsibility of the superintendent and the chairman of the boards of education from each district to name their school district representatives to this joint committee.



The committee should focus on establishing a basically fair code of conduct and behavior as well as sound, equitable and effective consequences for violations of the code of conduct. Conduct warranting suspension or expulsion should be clearly defined. Use of suspension or expulsion should be limited to a last resort and the committee should explore the use of effective alternatives to suspension or expulsion. Discipline procedures should include an opportunity for a prompt appeal by a student or parent to a bi-racial panel of administrative orders to remove or suspend a student. To the extent possible, the committee should explore and incorporate in its report recommendations to eliminate or minimize the opportunity for interjection of personal bias or negative racial attitudes in enforcement of discipline. Finally, the committee should avoid the use of excessive numbers of rules. An atmosphere that relies too heavily on rigid control of student behavior may become counterproductive.

Any code recommended by the committee shall clearly prohibit the use of racial epithets to antagonize others. In addition, possession of weapons on school premises shall be prohibited. Possession of weapons, in addition to other serious discipline problems, have been evident in the Benton Harbor senior high school.<sup>27</sup> Committee members should be made aware of the work done by an Ad Hoc Committee on School Safety in the Secondary Schools in the Benton Harbor Area School District. Each committee member should read the report of that committee presented to the Benton Harbor Board of Education on April 1, 1980. Some of the recommendations included in that report bear directly on questions of disciplines and proper school conduct.

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<sup>27</sup> This information came to the attention of the court in a "Report of the Adhoc Committee on School Safety in the Secondary Schools" presented to Dr. James Hawkins, Superintendent of the Benton Harbor Area Schools, and the Board of Education for the Benton Harbor Area Schools, on April 1, 1980.



The committee on conduct and discipline should submit its report and recommendations to the school district of each of the school districts for adoption. The report of this committee should be completed by November 30, 1981, with the intention that a uniform conduct and discipline code be implemented in the second semester of the 1981-82 school year.

It is equally important that once an appropriate uniform policy of conduct and discipline has been adopted that it be understood by administrators and faculty, be communicated to students and parents and enforced fairly. The committee shall be responsible for developing a plan to communicate the code to parents. The court anticipates that the Community Education Council will have an active role to play in distribution of the code. In addition, the code of conduct and discipline, once adopted, should be published and distributed to students, faculty, staff, board members and parents and incorporated, as well, in in-service workshops for each of these groups of interested people. In the future, the published code should be distributed to students and parents at the beginning of each school year, in the opening week of school.

#### **COURT'S REPRESENTATIVE FOR IMPLEMENTATION**

The court has asked Dr. Michael J. Stolee to act as its representative to assist the school districts in the process of implementation of the remedy plan. Throughout the body of the opinion there are several references to tasks to be completed with his assistance.

First of all, Dr. Stolee's presence and role in this desegregation process is warranted to assure that there is consistent and unbiased explanation of the court's plan throughout these three school districts. It will be his responsibility to explain the plan to the superintendents, central administration and members of the school boards of these three local school districts. He will act as the court's representative at an initial, joint meeting of the members of the three local school boards and the intermediate school board to be held within several days after the court's opinion has been issued. In addition, explanation of



the plan to teachers, support staff, students and parents will be done by Dr. Stolee or under his supervision. A schedule for explanation of the plan has been set out in Appendix A to the court's opinion. He has been asked to prepare a brief media explanation of the plan. This media presentation will be used by the school districts and made available to the communities to assure that accurate and consistent information about the plan is communicated throughout these three communities.

Dr. Stolee will be available as a consultant to the superintendents of these school districts in the initial stages of desegregation. The Benton Harbor district has been directed to adopt a student reassignment and transportation plan that will desegregate its schools and eliminate racial identifiability of schools. This will be accomplished by a staff committee appointed by Dr. Hawkins, the Superintendent of the Benton Harbor Schools, acting with assistance from Dr. Stolee. In addition, the superintendents of these three school districts, together with the superintendent of the Intermediate School District, have been directed to form a Superintendents' Council. This Superintendents' Council should meet at least monthly through the first year of the desegregation plan. Dr. Stolee will meet regularly with the superintendents, in an effort to facilitate establishing a cooperative and continuing relationship between them. Dr. Stolee brings valuable expertise to this task including expertise in educational administration, broad familiarity with the process of desegregation in other cities and school districts, and finally, he has achieved some familiarity with these three districts from having served as the court's expert through the remedy stage of this litigation. His presence and availability to the superintendents of Benton Harbor, Coloma, and Eau Claire should enhance cooperative, three-district adjustment to desegregation.

In addition, where problems arise, he will be available to give counsel and hopefully resolve disputes by suggested solutions rather than expose the parties to lengthy, expensive and time-consuming court hearings. It is not my intention that Dr. Stolee act in the capacity of a czar or as the court's spy in the



area. He will be a consultant and advisor. He will bring a wealth of desegregation experience, common sense and good judgment to communities historically short in these qualities.

### **COMMUNITY INVOLVEMENT AND MONITORING**

Each plan that the court has received and reviewed has emphasized the critical importance of community involvement to assure the effectiveness of this or any other desegregation effort. In fact, it has been suggested that the ultimate success of the plan will be directly related to the extent and level of support that can be generated for it in the three communities in the desegregated area. The experience in other communities has shown that whether parents are for or against school desegregation, their support rises as they increasingly feel that they have an effective voice in district policy-making concerning desegregation.

Efforts are being made by the court within the plan to encourage parent understanding of the plan and parent involvement in classroom and school activities. These are part of a deliberate effort to achieve the important goal of community involvement in the schools, in support of desegregation and in improving achievement motivation in the Benton Harbor Schools.

In order to facilitate an initial and ongoing peaceful and cooperative adjustment to desegregation within these school districts, the court will establish a broad-based, racially representative Community Education Council (CEC). This council will function and serve in several important capacities within the initial years of desegregation under the plan. The council will create a forum for interested community members to share information about the desegregation process. In addition, perhaps of equal value to sharing of information is the potential for the development of personal relationships and trust that will allow controversial issues to be explored and discussed.



***Membership.***

The CEC will include members representing each of these three communities. The court will attempt to identify and include persons who are interested, aware and able to influence orderly and positive adjustment to school desegregation. Efforts will be made to reflect the urban and suburban, racial and socioeconomic makeup of these three districts in selecting persons to sit on the council. Established community resources and institutions, including churches, law enforcement officials, representatives of state and local governments, civic groups, foundations, business and industry, labor, and a local college, as well as parents and students, will be represented in the membership of the council. Members of the CEC will be appointed initially to serve through June of 1982.

***Purposes.***

The purpose of the organization will be to bring together parents, citizens and organizations committed to working for the preservation and promotion of quality and stable desegregated public schools in the three districts. The organization must be pro-public schools, but neither for nor against busing for desegregation. To put it simply, the goals and objectives of the Council will be to assure: (1) accurate and adequate public information about all aspects of the desegregation process; (2) continuing quality public education; (3) citizen involvement in the process of desegregation; and (4) peaceful and effective implementation of the court order.

The CEC will operate as a liaison between the broader, three district communities and the school districts. As part of its role as liaison with the communities, the CEC should assure that every effort is made to achieve a broad based community awareness and understanding of the court's plan, its purposes and the process of implementation of that plan. The Council shall provide each of these communities with meaningful opportunities to become accurately informed about the court plan and the desegregation process. In addition, the CEC shall establish cooperative relationships with governments at all



levels, business and industry, the local college and other community resources to strengthen the effectiveness of school programs. Problems perceived by the community related to schools and the desegregation process should be communicated by the council to the school boards and school administrators. The court is hopeful that through this line of communication, legitimate concerns and fears within the schools and the communities can be addressed and prevented from escalating into conflicts that jeopardize personal adjustment to desegregation and success of the plan.

The school boards and school district administrators should consult with the CEC on problems they experience related to implementation of desegregation and solicit recommendations and advice on ways of reaching constructive solutions. Where appropriate, members of the CEC may be used to resolve problems by mediation and conciliation. Members of the council should make every effort to be aware of community feelings and concerns in the initial years of desegregation. It will be the role of this council to articulate community consensus on appropriate methods and actions to solve problems that arise in the desegregation process.

Finally, the council will be the primary body monitoring implementation of the court's order on behalf of the court. The CEC as part of its responsibilities shall follow the progress of the school districts in their adjustment to desegregation. The council is expected to make recommendations to the school boards in areas where it perceives the school district(s) may be failing to fulfill the objectives of the plan. The council shall monitor compliance with the objectives of the court's plan by other defendants as well. The CEC shall report at least semi-annually, during the school year, to the court on progress toward meaningful desegregation in these three school districts. The CEC will not co-manage or make policy for the Benton Harbor, Coloma or Eau Claire schools. Neither will it assume the responsibilities of the school boards and superintendents or any other defendants in carrying out the court's order.



Despite the important and valuable role the court is assigning to the CEC, I wish to make clear that it is not being set up to become a "super" school board. The schools will continue to be run by the elected school boards through their superintendents and staff personnel. It is the primary responsibility of the school boards, together with the other defendants, to implement to the fullest extent possible the desegregation remedy plan ordered by the court.

### TIMETABLE

Throughout the body of this opinion the court has directed that reports on aspects of the desegregation remedy be prepared and submitted to the court and the three district school boards. The court has, as well, established several deadlines for completion of tasks throughout the opinion. Where it has been ordered that reports be submitted to the court, copies shall be served on the court-appointed representative for implementation and the chairman of the CEC. The defendants, their officers, and their employees shall take all actions necessary to accomplish the steps set out below, on or before the dates listed:

- (1) May 12, 1981: Report to the court and the Benton Harbor School Board from superintendent of the BHASD on pupil reassignment plan and transportation plan, for reassignment of students within pairings and clusterings in the Benton Harbor school system for the 1981-82 school year.
- (2) June 30, 1981: Report to the court and each district school board from each superintendent on content of the inservice workshops conducted in May and June of 1981, evaluation of their effectiveness and recommendations for additional issues that should be included in fall inservice workshops.
- (3) July 1, 1981: Report to the court and the school boards from the magnet programs committee on magnet programs to be put in place in the 1981-82 school year and planning for magnet programs in the 1982-83 school year; and proposed literature on



magnet and interdistrict transfer programs to be sent to students and parents.

- (4) July 15, 1981: School boards shall have completed their review and comments on proposed literature to be sent to students and parents describing magnet programs, interdistrict programs and opportunities to elect to participate in either of these programs. Literature should be sent to the printer.
- (5) July 31, 1981: Literature described above, on magnet and interdistrict transfer programs should be sent to students and parents in each school district.
- (6) Summer 1981: Joint report to the court and the school boards from the three district superintendents and inservice team, reporting the content and agenda of fall intensive workshops for teachers and students to be conducted in the week before the opening day of school.
- (7) August 25, 1981: Joint report to the court and the school boards from the three district superintendents on student elections to participate in magnet programs and interdistrict transfers; and transportation plan for interdistrict transportation of students.
- (8) September 20, 1981: Report to the court and to each respective school board from each school superintendent on teacher hiring, reassignment and affirmative action goals for faculty and staff; and joint three district report on interdistrict teacher reassignment.
- (9) October 15, 1981: Report to the court and the Coloma and Eau Claire school boards from the Coloma and Eau Claire school district superintendents on curriculum and textbook racial bias evaluation.
- (10) November 1, 1981: Report to the court and the Benton Harbor School Board from Dr. Comer evaluating achievement problems identified in Benton Harbor schools.
- (11) November 30, 1981: Report to the court and school boards from school conduct and discipline committee on uniform conduct and discipline code; time should be permitted for comment and recommendation.



tions before approval and adoption by each school board.

- (12) June 30, 1982: Annual desegregation progress report from each school district superintendent; parts of this report should be completed jointly by the three district superintendents.

### ***Annual Desegregation Progress Reports.***

At the end of each school year, the superintendent of each of these three local school districts shall prepare a report that details the district-wide involvement and performance in implementation of the court's desegregation plan, of each district in the previous school year. Sections of the report on interdistrict magnet programs, interdistrict transfers, interdistrict teacher exchanges, interdistrict in-service workshops should be completed jointly. These reports should be submitted annually after the closing of the school year on June 30 of each year.

The annual desegregation progress reports shall contain the following information:

- (1) the number of students by race enrolled in each school district, in each school, in each classroom in the three local school districts;
- (2) the number of teachers by race in each district and assigned to each school within the district; description of teacher reassignment, affirmative action goals established and achievement of those goals;
- (3) the number of staff in each job category by race in each district;
- (4) the number of students electing to participate in the magnet programs and interdistrict transfers from each school district, with identification of the programs or schools where children are attending;
- (5) within the Benton Harbor School District, the number of students by grade level and by race transported to achieve desegregation under the plan;



- (6) the number of students suspended, the basis for each suspension and the length of each suspension; and the number of students expelled and the basis for expulsion; both broken down by race and indicating the dates of the disciplinary action;
- (7) student achievement information for fourth and seventh grade students on the MEAP for each elementary school and junior high school within the district;
- (8) whether all facilities, such as gymnasiums, auditoriums, cafeterias, are operated in a desegregated manner;
- (9) whether extracurricular activities and school events are operated in a desegregated manner;
- (10) any plan for new schools or additions to or expansion of existing facilities, with projected enrollment data by race and a statement of how such plan will affect desegregation, including participation in interdistrict desegregated magnet programs;
- (11) the sale or discontinued use of any school facility within the three districts, including the revenue received and the allocation of that revenue in the school district budget;
- (12) description and evaluation of in-service training provided to staff and students with details as to numbers of participants, the nature and length of programs and workshops;
- (13) a summary of activities of each district desegregation representative(s) within each school building since the superintendent's last report.

## FINANCE

The plans submitted to the court during the remedy hearing have avoided recommendations to the court on the difficult and complex problems of financing of this remedy plan. Dr. Stolee has recommended a plan for financing development of magnet programs, interdistrict transfers, transportation, in-service training, and costs involved in improving the educational quali-



ty of schools operated in the Benton Harbor system. In several of these areas, the court has followed his recommendations.

Federal funding of programs outlined in this plan should be sought to the maximum feasible levels by the three local school districts, the intermediate school district, and the state acting cooperatively.

In addition, magnet programs should be financed in part by the existing operating budgets of the three local districts and supplemented by additional financial contributions from the state and intermediate district. Consultant assistance for development and initial implementation of distinctive magnet programs should not exceed \$50,000 per year for the period from the date of this court's order to the end of the 1981-82 school year, and for the 1982-83 school year. These consultant expenses shall be paid by the defendants as follows: the State of Michigan, 60%; the Benton Harbor School District, 15%; the Intermediate School District, 10%; the Coloma School District, 10%; and the Eau Claire School District, 5%. Each local school district shall assume the costs of continuing administrative and teaching staff through the summer of 1981, to the extent reasonably necessary for planning of magnet programs and in-service programs to be put in place in the 1981-82 school year.

No school district shall be penalized financially or lose any state financial aid as a result of a student or parent's decision that a student will take advantage of interdistrict educational opportunities under this court's plan. If districts stand to lose financial resources when students transfer, their motivation to encourage their own students to participate in these programs will undoubtedly be diminished. Additional resources generated above and beyond regular district operating budgets under the financial plan set forth in the paragraph below shall be used by the districts acting cooperatively to finance enriched educational opportunities and magnet programs, in each district, for the benefit of children in all three districts.

The State of Michigan shall assume 100% of the following costs. For each student who elects to attend school in one of



these three districts, other than his or her district of residence, the state shall continue to pay to the school district of residence, the amount of state financial aid that the student would have generated had he or she not elected to transfer. For each pupil transferring to another district under this plan, either by participating in a magnet program or by election of an interdistrict transfer, the state shall pay the receiving school district 100% of the costs involved in educating that pupil. Education costs under this provision shall be computed as an amount equal to the receiving school district's annual maintenance costs per regularly enrolled student.

In order for these interdistrict programs to be effective, transportation for voluntary transfers under the magnet program and interdistrict transfer component must be provided at no cost to the transferring student. *See, Swann, supra*, 402 U.S. at 26-27, 91 S.Ct. at 1281-1282; and *Keyes, supra*, 413 U.S. at 240-241, 93 S.Ct. at 2713-2714 (opinion of Powell, J.). Transportation costs for travel to and from school for each transferring pupil shall be provided by the school district of the child's residence. The state shall reimburse the local school district for these transportation costs according to a funding formula used for transportation of other students entitled to school transportation at public expense. Reimbursement shall cover capital outlay and continuing operating expenses connected with interdistrict transfers. Every effort should be made to coordinate school openings and closings of the three districts so that existing buses will be used to their maximum effectiveness in the interdistrict components of the plan. The court-appointed transportation expert will be available to assist in development of cost efficient transportation schedules.

Costs necessary for development and implementation of the social skills and achievement components of the plan will be paid by the State of Michigan according to a formula originally developed by the legislature and used to determine the allocation to each district eligible to participate in the Article 3



program, designed to enable school districts to conduct educational programs to improve basic cognitive skills.<sup>28</sup>

This formula is based on 1980 achievement scores of students in the fourth and seventh grades in the Benton Harbor district. The statutory formula has been modified to include a budget adequate to cover the Benton Harbor junior high schools and the senior high school. This formula is used by the court only for the purpose of calculating an adequate budget to conduct the programs under the achievement component of the court's plan. It should not be used by the district to identify low achieving students or to stigmatize students in any way.

State financial contributions to this component of the plan, for the next three school years, shall be based on the estimated number of students in the Benton Harbor schools in grades K through 6 and grades 7 through 12, who are in need of achievement motivation and basic cognitive skill development. The number of these students in the district will be estimated based on a formula which uses the percentage of students in grade 4 and grade 7 who attained 40% or fewer achievement objectives on the statewide achievement tests in the preceding school year.

Using the reading and mathematic scores on state-wide achievement tests given in the Fall of 1980, the percentage of the district's pupils in grade 4 who attained 40% or fewer of the reading objectives and the percentage who attained 40% or fewer of the mathematics objectives shall be averaged. The aggregate enrollment of the district in grades K through 6 on the official membership count date in September of 1980 shall be multiplied by this average percentage to determine the estimated number of students in grades K through 6 in need of

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<sup>28</sup> "Article 3" is a state-funded program under the State School Aid Act of 1979, under which money is appropriated and allocated to school districts for educational programs designed to improve achievement in basic cognitive skills. The provisions of that article are codified at M.C.L.A. § 388.1631 *et seq.*



assistance in developing basic achievement motivation and cognitive skill improvement under this component of the plan.

A similar formula shall be applied to determine the estimated number of students in grades 7 through 12 with similar developmental and achievement needs. Using the reading and mathematic test scores on state-wide achievement tests given in the Fall of 1980, the percentage of the district's students in grade 7 who attained 40% or fewer of the reading objectives and the percentage who attained 40% or fewer of the mathematics objections shall be averaged. The aggregate enrollment of the district in grades 7 through 12 on the official membership count date in September of 1980 shall be multiplied by this average percentage to determine the estimated number of students in grades 7 through 12 in need of assistance in basic achievement motivation and cognitive skill improvement under this component of the plan.

An estimated total number of students in grades K through 12, who are in need of achievement motivation and cognitive skill improvement, shall be calculated using this formula. The State of Michigan shall, as part of its participation in this remedy plan, pay to the Benton Harbor School District an amount equal to \$200 per pupil. This money will be used by the school district exclusively to implement the achievement component of the court's plan. This budget figure represents the total amount of the budget for the achievement component of the plan for each of the next three school years.

Funds distributed to the district by the state under this formula shall be used to conduct an initial evaluation of the school district, to pay fees and expenses of the court appointed consultant, salaries of professional staff, psychiatric or psychological consultants hired under the achievement component, educational materials used in that component, and finally periodic evaluation of the component. This money will be allocated to the school district in addition to any money that it is entitled to under Article 3 of the State School Aid Act, M.C.L.A. § 388.1631 *et seq.* The school district's allocation



under that section shall not be diminished in any way as a result of money paid under this court's order for implementation of the achievement component of the plan.

After three school years, and for each school year thereafter in which the component continues, the budget for the achievement component will be readjusted applying the same formula using achievement data and enrollment statistics for the immediately proceeding school year. If the district shows evidence of having attained the achievement goals, in the schools within its boundaries, as established by the court in this opinion, the program will be continued, but progressively phased out, over two additional years. In the school year immediately following the year in which achievement goals are attained, funds for this component shall be distributed to the district in an amount equal to 50% of the amount received under this formula in the preceding school year. In the final year of operation of this component, the funds distributed will be in an amount equal to 25% of the amount received in the base school year.

The cost of conducting the in-service and human relations training program for employees and students of the three local school districts shall be paid by the State of Michigan. Payment may be satisfied by the state through a combination of contribution of services by qualified personnel from the State Department of Education and direct payment jointly to the three school districts. The school districts jointly shall spend and the state shall subsidize an amount equal to \$100 per employee of the three local school districts, for the period from the date of this court's order through the end of the 1981-82 school year. Costs for the succeeding 1982-83 and 1983-84 school years should be in an amount equal to \$20 per employee in these three local districts. These costs to the state shall represent actual money allocated and credited shares of the salary of any professionals already on the state payroll, who are actively involved in conducting in-service under the court's plan. The amount of the salary of any professional used in this capacity shall be credited in an amount representing the proportion of their annual salary equal to the proportion of



their time spent on in-service training within the three school districts.

Contribution of services and money paid by the State of Michigan and the Intermediate School District for purposes of implementing this plan shall be paid in addition to usual program and financial aid assistance paid to these three local districts.

A teacher who is reassigned to another school district for purposes of facilitating adjustment to interdistrict aspects of this plan and contributing to affirmative action goals shall remain an employee of the home school district, on temporary reassignment. Each reassigned teacher will continue to have his or her regular salary paid by his or her home school district. Provided there is a one-on-one teacher exchange between the Benton Harbor district and the Coloma district or the Benton Harbor district and the Eau Claire district, there will be no reimbursement from the district receiving the teacher's services. If, however, a black, Benton Harbor teacher is reassigned to the Coloma or Eau Claire district and no teacher from the receiving district is reassigned to the Benton Harbor district, the receiving district shall reimburse the home school district for the salary and benefits of the reassigned teacher. The home school district will continue to pay the teacher's salary and will bill the district receiving the teacher's services. The salary of any reassigned teacher shall continue to be commensurate with the salary he or she would have received in the home school district. These teachers shall be paid each year an additional \$1,000 as an incentive salary to encourage voluntary and cooperative election for a two-year reassignment to another school district. This incentive salary shall be paid by the school district responsible for paying the teacher's salary. The State of Michigan shall reimburse the district in quarterly increments throughout the school year for any amounts paid as teacher incentive salaries.

Under the court's recommended reassignment plan, for desegregation of the Benton Harbor schools, transportation for



purposes of achieving complete desegregation should be accomplished without additional purchase of buses by the school district. Should, however, the school district find that the existing bus fleet is not adequate to accomplish transportation under a desegregation plan, and that purchase of additional buses is necessary, the court will issue supplementary orders dealing with the financial responsibility of the defendants for transportation costs.

### CONCLUSION

In formulating a desegregation remedy, the court has tried very hard to consider the interests and concerns of all persons and organizations who will be affected by the plan. Over the past several months, I have received and read a great volume of correspondence from individuals representing all points of view. Hopefully, a careful reading of the plan itself will reflect that my primary concern has been to devise a constitutionally-acceptable plan which will be in the best interests of the students themselves.

The extent to which it will succeed in desegregating the public schools and improving the quality of education within those schools remains to be seen. One thing, however, is crystal clear: the quality of education of a generation of students is at stake. It is the students in the schools who will be directly and permanently affected by the way the citizens of Benton Harbor, Coloma, and Eau Claire, as well as the Intermediate School District, the State Board of Education, the State Superintendent of Education, the Attorney General, the Governor, and the State of Michigan carry out the plan.



## **APPENDIX IV**



UNITED STATES OF AMERICA IN THE DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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**Case No. C. A. 9**

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BARBARA JEAN BERRY, et al.,

*Plaintiffs,*

v.

SCHOOL DISTRICT OF THE CITY OF  
BENTON HARBOR, et al.

*Defendants.*

**ORDER**

The court has issued concurrently with this order its opinion detailing a desegregation remedy plan. This plan is to be implemented by the defendants to remedy the impact of their past segregative acts. In order to ensure implementation of that remedy plan; IT IS HEREBY ORDERED THAT:

1. The order of this court entered in this action on November 8, 1979, is set aside.

2. The defendant, Coloma Community School District, in accordance with the court's opinion, is directed to return the Eaman area to the Benton Harbor Area School District (BHASD) together with the four-room elementary school located in that area. Beginning in the 1981-82 school year, kindergarten through 12th grade students from the Eaman residential area who attend public schools shall attend schools in the BHASD (with the exception of certain transfers that are permitted and encouraged under the court's plan).

3. The defendants, including the BHASD, the Coloma School District, the Eau Claire School District, the Berrien County Intermediate School District, the State Board of Edu-



cation, and the Superintendent of the Michigan Department of Education (hereinafter the defendants), are permanently enjoined from initiating, encouraging or approving transfer of the Eaman area out of the BHASD to the Coloma School District or any other school district.

4. Defendants, Coloma and Eau Claire School Districts, are permanently enjoined from accepting in their public schools any tuition students from BHASD except under the circumstances and terms permitted under this plan.

5. The defendants are permanently enjoined from initiating, encouraging, or approving transfer of the Sodus II area, or any other part of that area, out of the BHASD to the Eau Claire School District or any other school district.

6. The defendants, their administrators, officers, staff members and employees are permanently enjoined and prohibited from taking any further actions motivated by a segregative purpose that affirmatively discriminate against minority students on the basis of race.

7. The defendants, their administrators, officers, staff members and employees are expected to take all steps necessary to accomplish the tasks outlined in the court's opinion of this date, on or before the dates specified in that opinion, and to implement the court's desegregation plan, consistent with the court's opinion.

8. The State of Michigan is directed to pay the following expenses related to this desegregation plan:

(a) Sixty percent of the fees for consultants used in the magnet programs component of the plan, for the 1981-82 school year and the 1982-83 school year;

(b) transportation costs, according to the existing state transportation reimbursement formula, for students transported across school district lines to participate in the magnet programs and or interdistrict transfer components of the plan;



(c) for each student who elects to transfer to another school district under the court's plan, the state shall continue to pay the home school district 100% of the state financial aid that that student would have generated had he or she not elected to transfer;

(d) for each interdistrict transfer student, transferring under this plan, the state shall pay to the receiving district 100% of the costs involved in educating that pupil, computed as an amount equal to that district's annual maintenance cost per enrolled student;

(e) the annual budget for the achievement and social skills component of the plan, calculated according to the formula set out in the court's opinion at pages 75 and 76, for each school year, until further order of the court;

(f) fees and expenses of Dr. Michael J. Stolee, acting as the court's representative for implementation of the desegregation plan;

(g) the state shall reimburse school districts, in at least quarterly increments throughout the school year, for teacher incentive salaries of \$1,000 per teacher, paid by the district, for each teacher accepting a temporary cross-district reassignment under this plan; and

(h) the annual budget for the in-service training program, in an amount equal to \$100 per employee of the three school districts for the 1981-82 school year and \$20 per employee for the 1982-83 and 1983-84 school years. These expenses may be paid in actual money allocations or in inkind services of qualified professionals or a combination of both.

9. The Benton Harbor School District shall pay, as its participation in the remedy plan, 15% of the fees for consultant services used in development of interdistrict desegregated programs under the plan in the 1981-82 and 1982-83 school years.

10. The Berrien County Intermediate School District shall pay, as its participation in the remedy plan, 10% of the fees for



consultant services used in development of interdistrict desegregated magnet programs under the plan in the 1981-82 and 1982-83 school years.

11. The defendant, Coloma School District, shall pay, as its participation in the remedy plan, 10% of the fees for consultant services used in the development of interdistrict desegregated magnet programs under the plan in the 1981-82 and 1982-83 school years.

12. The defendant, Eau Claire School District, shall pay, as its participation in the remedy plan, 5% of the fees for consultant services used in the development of interdistrict desegregated magnet programs under the plan in the 1981-82 and 1982-83 school years.

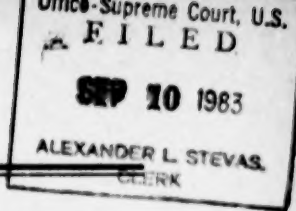
IT IS SO ORDERED.

/s/ Douglas W. Hillman  
DOUGLAS W. HILLMAN  
District Judge

Dated: May 1, 1981.



Nos. 83-66 and 83-254



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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COLOMA BD. OF ED., et al.,  
*Petitioners,*  
v.

BARBARA JEAN BERRY, et al.,  
*Respondents.*

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ZELMA FELLNER, et al.,  
*Cross-Petitioners,*  
v.

BARBARA JEAN BERRY, et al.,  
*Respondents.*

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**CONSOLIDATED OPPOSITION OF BARBARA JEAN  
BERRY, RESPONDENTS, TO PETITIONS FOR  
CERTIORARI OF FELLNER AND COLOMA  
BOARD OF EDUCATION**

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PLAINTIFFS'-RESPONDENTS' CONSOLIDATED  
OPPOSITION TO THE PETITIONS FOR  
CERTIORARI OF THE COLOMA DEFENDANTS  
AND THE SODUS INTERVENORS

STATEMENT OF ISSUES

This is a school desegregation case, in which three local school districts, a county school district and state education officials took actions with the intent and impact of creating racially segregated schools in Benton Harbor, Michigan.



The single issue before the Court in these two petitions is whether the district and circuit courts abused their discretion, after full and lengthy evidentiary trials on both liability and remedy, in finding inter-district violations and ordering modest and limited inter-district relief carefully tailored to reverse the impact of the adjudicated violations.

Plaintiffs-Respondents contend that the answer in each instance is NO, that the actions taken below were permissible and not an abuse of discretion, that each were supported by strong record evidence, and that no basis in either law or fact exists for this court to grant the Writs sought.

#### FACTUAL STATEMENT

Plaintiffs accept, essentially and with the exceptions noted hereinbelow, the statement of facts set forth by the Coloma



petitioners.<sup>1/</sup> Plaintiffs reject as devoid of record support the statement of facts of the Sodus Intervenors (Fellner, et al.).

A. THE EAMAN TRANSFER TO COLOMA

As set forth in the Coloma factual statement, this transfer was consummated in 1970, by action of the State Board of Education. The State Board's approval of the transfer came despite the expressed opposition of the Benton Harbor and Intermediate School District Boards, the strong recommendations against the transfer from each of two of the State Board's own Hearing Officers, after separate hearings and the strong and explicit opposition to the transfer by the State Board's own chief executive officer, the State

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1 / See page 2 of Coloma petitioners' Brief.



Superintendent of Public Instruction. The Coloma Board, while declining to state either opposition or support at the hearings before the Intermediate District Board,<sup>2/</sup> took definite action to indicate its actual support for the transfer by the time the matter had arrived at the State Board.

Not in dispute is that the State Board approval action was taken despite explicit notice of the pendency of the lawsuit filed in 1967 charging de jure conduct in the creation of public school segregation in Benton Harbor.<sup>3/</sup> This notice came to the State Board through the statements of the Benton Harbor Board's counsel, when he

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<sup>2/</sup> See p. 22-A, Coloma Petitioners' Appendix, Judge Hillman's Remedial Decision.

<sup>3/</sup> See p. 17-A, Coloma Petitioners' Appendix, Judge Hillman's Remedial Decision.



appeared on behalf of Benton Harbor to oppose the transfer. He stated that he had been unable to make an earlier hearing before the State because he had been in trial in the school discrimination case, and he also informed the state officials that the transfer would involve an area in which all the residents and students were white, from the majority-black Benton Harbor School District, at a time the district was still trying to effect stability from an earlier consolidation of some 17 smaller districts. He also informed the state official that approval of the transfer would amount to an independent act of de jure segregation on the part of the state, specifically noted the racial motivations of those seeking to leave the Benton Harbor district, and pointed out that the Coloma District to which the territory would be transferred was itself



virtually 100% white. 4/

The number of students involved was approximately 150/year, a fact not in dispute. Also not in dispute is that the Coloma Board, after having appeared before the State Board on other occasions to state explicit opposition to property transfers in which they were interested, failed to either appear or state opposition to the transfer of this Eaman area, despite its knowledge of Benton Harbor's strong opposition based in part on fears of increasing racial segregation within Benton Harbor were the transfer approved.

Also not in dispute is that the area transferred, in addition to containing 150 white students, contained a school building and other residential property of considerable

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4 / See 467 F Supp. 630, p. 647 Interdistrict-Liability Opinion of Judge Fox.



financial value to the Benton Harbor district, which stated these as additional reasons for its opposition to the transfer's approval. This information was put before the State Board prior to its approval action, through the reports of the Superintendent and the two separate reports of the State Hearing Officers, as well as through the Benton Harbor testimony and that of the black and white Benton Harbor citizens who came to the hearing and opposed the transfer.<sup>5/</sup>

The State Attorney General, charged by state law with providing legal representation and advice to the State Board, was also aware of the pendency of the school discrimination litigation involving Benton Harbor, knowledge received prior to the final State Board action approving the transfer.

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5/ Id. at p. 634.



Finally, the State Board was explicitly told that approval of the Eaman transfer to Coloma would trigger other transfer petitions from white areas of Benton Harbor, by white residents also seeking to escape the majority-black Benton Harbor district, and that these predictable efforts would thwart any Benton Harbor plans to stabilize the newly-consolidated district and further segregate the schools in Benton Harbor. <sup>6/</sup> Ibid.

B. THE SODUS TRANSFER TO EAU CLAIRE

Immediately after the initial State Board approval of the Eaman transfer, and as predicted by the Benton Harbor Board, a series of other transfer petitions were filed from white areas of Benton Harbor, each seeking to escape to an adjacent white school district. One such petition came from residents of the predominantly white Sodus

6 / Id., p. 646-467.



area.

The initial Sodus petition included an area which was predominantly black, even though the racial composition of the area sought to be transferred was overwhelmingly white. This petition to transfer was strongly opposed by Benton Harbor's Board, opposed by the Eau Claire Board, opposed by the Intermediate District Board, opposed by the State Hearing Officer, opposed by the State Superintendent of Public Instruction, and disapproved by the State Board.<sup>7/</sup>

At the hearings on this initial Sodus petition, the Eau Claire Superintendent, on behalf of the Eau Claire Board, indicated that his district would not have opposed the transfer if it had been comprised of less territory and students. The territory which

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<sup>7/</sup> Id., p. 656.



the Eau Claire Superintendent indicated should not have been included happened to be the precise territory which was the predominantly black portion of the first transfer attempt.<sup>8</sup> /

Educated by the nature of the Eau Claire opposition to the first Sodus transfer attempt, the Sodus petitioners submitted a second transfer petition which, like the first petition, sought to join the Sodus area with Eau Claire. It just happened to be the case that the territory included in the Sodus II transfer petition concided precisely with what the Eau Claire Superintendent has stated Eau Claire would not oppose receiving.

By the time this Sodus II transfer petition reached the Benton Harbor Board for its response, school board elections in Benton Harbor had resulted in the election of a

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<sup>8</sup> / Id., p. 682-683.



majority of white Board members who had earlier stated their explicit support for the various transfer petitions then pending. Indeed, some of the new Board members had themselves been signatories on transfer petitions which had earlier been opposed by Benton Harbor and disapproved by the Intermediate District and State Boards. <sup>9</sup>/

Due to the dramatic change in the Benton Harbor Board membership, the Benton Harbor Board abandoned what had been consistent and uniform opposition to all transfer attempts involving predominantly white areas seeking to join adjacent white districts. The new Board voted "not to oppose" the Sodus II transfer petition.

The Eau Claire Board, taking its cue from the Benton Harbor Board and mindful of the composition of the new territory being pro-

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<sup>9</sup>/ Id., p. 652.



posed for transfer, also voted "Not to oppose" the Sodus II transfer.

The Intermediate District Board, after being informed of the Benton Harbor and Eau Claire Board actions, explicitly interpreted the actual positions of these two districts as "in support," and itself approved the Sodus II transfer. The Intermediate District Board stated that its approval was because of the support for this transfer by the sending and receiving districts.

The State Hearing Officer, notwithstanding the positions below of the Benton Harbor, Eau Claire and Intermediate District Boards, recommended that the transfer be disapproved by the State Board, in part because of the undeniable adverse racial impact which the transfer would have on Benton Harbor and because the transfer would have adverse educational impacts on Benton Harbor. The Hearing Officer specifically found that the



petitioning area was no closer to Eau Claire's schools than Benton Harbor's, that the Eau Claire schools were overcrowded and the Benton Harbor schools had adequate space, that the Eau Claire district had failed to obtain certification from the recognized regional certification agency, that the Sodus II area differed from the Sodus I area only in that the black portion had been stripped away, and that the transfer would have adverse financial impact on Benton Harbor. <sup>10/</sup>

The State Superintendent of Public Instruction also recommended against approval of the Sodus II transfer, citing the findings of the State Hearing Officer and the record testimony which produced those findings. <sup>11/</sup>

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10/ Id., pp. 653-656 .

11/ Id., p. 653 .



The State Board of Education approved the Sodus II transfer petition, leading directly to the successful motion by these Plaintiffs to get an injunction from the federal district court to prevent the transfer from taking place.<sup>12/</sup>

Shortly after successfully enjoining the Sodus II transfer from being effectuated, Plaintiffs amended the Benton Harbor school discrimination complaint to join as additional parties the Eau Claire, Coloma, Intermediate School District and State Boards and their respective Superintendents, along with the Governor, State Attorney General and the State Municipal Boundary Commission. The Amended Complaints adding these parties charged that each had engaged in purposeful action to exacerbate the racial segregation in the Benton Harbor public school district.

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<sup>12/</sup> Id., pp. 656-658.



Plaintiffs sought to have the Eaman transfer to Coloma rescinded and vacated, to have the injunction made permanent against the Sodus II transfer, to have the added parties assist in the process of desegregating the Benton Harbor public schools, and to have appropriate injunctions to prevent recurrence of the conduct of which Plaintiffs complained.

The District Court granted intervention motions by parents representing the Eaman and Sodus II transfer areas, restricting each group of intervenors to the aspect of the case relating to their particular transfers.

#### PROCEEDINGS BELOW

The statement of proceedings below is essentially as set forth in the Coloma-Petitioners' submission, at page 6.

Having initially found against the Plaintiffs on major elements of their intra-district complaint against Benton Harbor, the district court was reversed in part and, on



remand, was instructed to treat the Plaintiffs' proofs as having established a prima facie case. Those proceedings included an opportunity for the added parties to participate to the extent they so chose, and resulted in a district court remand finding that the Benton Harbor defendants had failed to carry their burden and that the Plaintiffs had successfully proven de jure conduct against Benton Harbor, with entitlement to appropriate remedy (442 F Supp. 1280).

The remedy proceedings were deferred, pending the trial against the added parties. The trial against the added parties resulted in district court findings that Benton Harbor, Coloma, Eau Claire, Intermediate District and State Boards and their respective superintendents had engaged in inter-district de jure conduct. Similar findings were made against the Governor and State Attorney General, though the district court granted



the motion to dismiss of the State Municipal Boundary Commission at the conclusion of Plaintiffs' case against the added parties (467 F Supp. 630).

In a separate proceeding, the district court considered the appropriate remedial relief, in light of the violation findings which had been made. To assist the Court in evaluating remedial options, the district court fashioned a panel comprised of the Benton Harbor, Coloma, Eau Claire and Intermediate District Superintendents, to be chaired by the State Superintendent, with instructions to submit a proposed remedial plan, along with any minority recommendations. This panel submitted its recommendations, as did the Benton Harbor Board as a minority report. Plaintiffs also submitted remedial recommendations to the Court.

The Court appointed a three-member Panel of Experts to review and evaluate the various



remedial recommendations, with instructions that it was to recommend either one of the options before it, some amalgam of those options or, if it decided none of the options were adequate and responsive to the Court's violation findings and remedial instructions, its own remedial plan. The Panel chose to submit its own remedial plan, borrowing some elements from the options before it but substantially differing from each option.

The District Court essentially adopted the Panel's remedial recommendations, after a remedial hearing at which testimonial and documentary evidence was received.<sup>13/</sup>

Prior to implementation of the district court's remedial plan, the district judge's health required him to recuse himself from the further proceedings in the case. The

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<sup>13/</sup> Coloma Appendix at p. 23-A, Judge Hillman's Remedial Opinions.



new judge was immediately faced with new trial motions from each of the adjudicated defendants, along with motions to reconsider the remedial plan ordered into effect.

The new district judge denied each of the new trial motions, but decided to revisit the question of appropriate remedial relief. After an additional remedial hearing, the district court issued the remedial order which forms the basis for these Petitions.<sup>14/</sup>

The Court of Appeals affirmed the district court's findings of violation against each of the adjudicated defendants, and affirmed the remedial order of the district court.<sup>15/</sup>

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<sup>14/</sup> Coloma Appendix at p. 14-A, Judge Hillman's Remedial Opinion.

<sup>15/</sup> Coloma Appendix at p. 7-A with circuit opinion affirming district court.



## ARGUMENT

### I.

THE PROCEEDINGS BELOW, CONFORMED WITH THE APPLICABLE FEDERAL RULES, PROVIDED EACH PETITIONER A FULL AND FAIR OPPORTUNITY TO MAKE AN ADEQUATE RECORD AND DENIED NO PARTY DUE PROCESS

As set forth above, each of the adjudicated defendants, including these Petitioners, was afforded a full and fair opportunity to adduce and present such evidence as would tend to support the legal positions being urged to the court.

The Petitioners-defendants were each permitted to engage in broad discovery, and did. The record below reveals the extensive discovery which was conducted by all the parties, including these Petitioners.

The Petitioners were permitted to participate in all phases of the liability proceedings which took place after they were joined, and all the pertinent liability proceedings took place after these defendants



became full parties. The Petitioners presented fact and expert witnesses designed to support their legal positions and view of the facts, and had a full opportunity to convince two separate district court judges of that view. The Benton Harbor defendants, not Petitioners here, had an opportunity to convince three separate judges, since the present judge is the third district court judge to preside over these proceedings.<sup>16/</sup>

The District Court did not limit the ability of these Petitioners to proffer evidence or witnesses, nor to examine such evidence or witnesses as were put forth by other parties, including the Plaintiffs-Respondents.

The second set of remedial hearings held

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<sup>16/</sup> The initial District Judge was Wallace Kent. The second District Judge was Noel Fox. The third and present District Judge is Douglas Hillman.



by the present presiding judge resulted in a remedy considerably more modest than the initially ordered plan. This fact alone establishes that the Petitioners were given every opportunity below to make their record and produce bases for either non-liability or to limit their inclusion in the reach of any remedial relief ordered. The initial remedial plan would have consolidated the three local districts, required student and staff reassignments within the entire consolidated area, and fundamentally altered the nature and character of all three districts. The relief ordered by the present judge, which Plaintiffs resisted as inadequate in the face of the record evidence and violation findings, merely required that the transferred territory be returned to Benton Harbor, enjoined further similar transfers, enjoined student transfers which would be segregative, and required the Coloma and



Eau Claire districts to make available seats for Benton Harbor black students, should any so choose.

The Sixth Circuit review and affirmance of the lower court orders on liability and remedy likewise afforded each Petitioner a full and fair opportunity to be heard on all pertinent issues presented.

## II.

THE LIABILITY FINDINGS BELOW WERE BASED ON SOLID AND CREDIBLE RECORD EVIDENCE, ADDUCED AFTER FULL EVIDENTIARY PRESENTATIONS BY ALL PARTIES, AND DO NOT REPRESENT EITHER AN ABUSE OF DISCRETION OR CLEARLY ERRONEOUS LOWER COURT ACTIONS

The issue before this Court on the Petitions presented is not whether there were other factual findings which the courts below could have made, but whether the record is devoid of support for the findings of liability which were made.

### A. The Eaman Transfer of Coloma

The District and Circuit Courts were both



entitled to find, on the record before them, that Coloma's protestations of innocence were not credible, and did so find.

The district court noted that Coloma had previously appeared before the State Board and stated explicit opposition to property transfers in which it had no interest. The Court was entitled to disbelieve the Coloma assertion that its non-appearance was because it assumed the State Board would deny the transfer, based on previous state actions.

The district court was aware that, had Coloma actually opposed the transfer, it had ample opportunity to demonstrate this opposition: there was a hearing before the State Hearing Officer; there was a second hearing before the State Board itself. The district court was entitled to believe that, had Coloma actually opposed the Eaman transfer, it would have found some means at one of the above five, separate, hearings to mouth that



opposition.

The District Court also had testimony before it, which it credited, showing that a teacher in the Coloma District had been a State Representative, and had served on the Legislature's Education Committee. This teacher, with the full knowledge of the Coloma officials, led the lobbying effort at the State Board level in support of the Eaman transfer approval. The District Court knew from the record evidence that, on at least one occasion, the former State Representative was able to make the journey from Coloma to Lansing to lobby for this transfer only because the Coloma Superintendent, himself, substituted for and taught the class of the <sup>17/</sup> missing teacher.

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17/ See 467 F Supp. 630 at pp. 674-676, 680 Judge Fox's Interdistrict Liability Opinion concerning former State Representative Mattheeussen.



The District Court knew, from record evidence it credited, that Coloma had been unsuccessful in passing a much sought after bond issue, and that the Coloma officials let the petitioning Eaman parents know that their support for the bond issue would be greatly desired. The courts below were entitled to believe that the promised electoral support for the bond issue which came from the Eaman parents was yet another piece of evidence negating the Coloma assertion of opposition to the transfer. The bond issue, as the Court was shown, did pass, because of the votes of the Eaman parents.

The Courts below also knew that the Coloma officials explicitly rejected the request of Benton Harbor that the school building on the Eaman transfer territory be left in the Benton Harbor district, and that the Coloma officials arranged with the Eaman parents that these parents would privately raise the



monies necessary to pay Benton Harbor for the school building being transferred, an amount in excess of \$40,000. In fact, the Coloma officials were so eager to enroll the Eaman transfer students and be able to include the parents of these students in the district in time for the bond vote, they disregarded explicit instructions from the State Board and enrolled the Eaman transfer students in Coloma's schools well before the payment is-  
18/  
sue was resolved.

Based on the record evidence before it, the district court was permitted to conclude that the Coloma defense was a mere pretext, masking its undeniable eagerness to consummate and its covert assistance in obtaining approval for the Eaman transfer.

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18/ Id., at p. 679



That the courts below could have drawn different conclusions from the record evidence is irrelevant, since the conclusions drawn by these courts were amply supported by the record.

B. The Sodus Transfer to Eau Claire

The district court received evidence sufficiently persuasive to permit it to find, without error, that the Eau Claire Board had not only been receptive to the Sodus II transfer, but had indeed been the virtual architect of it.

The district court was aware, from the record evidence, that the Eau Claire Superintendent was a man who had been a Benton Harbor Assistant Superintendent, had detailed knowledge of the educational and racial facts and factors relating to the Sodus I and Sodus II transfer areas, had prior knowledge of the school discrimination litigation involving Benton Harbor, knew of the numerous



other transfer petitions by white residents of Benton Harbor to escape the majority black district, knew of the substantial change in the makeup of the Benton Harbor Board and the promise by the new Board members to support the dismemberment efforts, and had detailed knowledge of the general racial composition of the Benton Harbor district and its schools. Indeed, this Eau Claire Superintendent had himself been in charge of one of the areas which had made repeated efforts to escape Benton Harbor by the same transfer petition route.<sup>19/</sup>

The courts below were also aware that the Sodus II petition which Eau Claire voted "not to oppose" was identical to the territorial contours of what the Eau Claire Superintendent had predicted, during the Sodus I hearings,

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<sup>19/</sup> Id., concerning Eau Claire Supt. McAlvey at pp 682-683.



would not be opposed. And, as the record established, the courts below knew that Eau Claire's "not to oppose" position had changed to active support by the time the transfer petition reached the state officials. Indeed, Eau Claire registered its support, not non-opposition, at both the hearing before the State Hearing Officer and the State Board, as each noted. 20/

Under these circumstances, and in light of the undenied fact that the transferred territory was significantly less-black than the Benton Harbor district's racial composition, the courts below did not err or abuse their discretion in concluding that Eau Claire had been actively involved in the events leading up to the effectuation of the Sodus II transfer, and that its earlier

20/ Fellner petitioners brief at p. 10.



"not to oppose" vote was mere pretext.

It does not matter that the courts below might have decided to credit Eau Claire's defense, given the substantial record basis for the conclusions reached below.

C. The Status of the Intervenor-Petitioners

It is significant that Eau Claire, itself, did not choose to prosecute an appeal from the lower court decision before this Court. The Intervenor who urge this Petition stand alone, as it relates to the Sodus II transfer. While the Coloma Petition generally challenges, as ultra-vires, the remedial action taken below, Coloma claims no special relationship to the Sodus II transfer petitioners, and could not do so on the record established below.

While the effort of these Intervenor is within the scope of the intervention they were granted, this Court should not ignore that the issues they raise have already been



abandoned by the State and Eau Claire boards. The State Board has already, with permission of the district court and before the district court concluded the remedial hearings, rescinded its earlier approval of the Sodus II transfer. The State Board has also adopted new procedural requirements and policies which would prevent a matter such as the Eaman or Sodus II transfers from being acted on during the pendency of school discrimination litigation of the type pending when both of these two petitions were being prosecuted. Thus, to an extent, the issue on which the intervenors wish this court to act has been mooted by the state board's decision to rescind the approval and adopt new procedures which would preclude consideration being given <sup>21/</sup> in the future.

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21/ See 467 F Supp. 630 Judge Fox Interdistrict Liability Opinion at p. 691 and pp. 634-638.



### III.

THE COURTS BELOW ACCURATELY PERCEIVED  
AND APPLIED THE CONTROLLING LEGAL  
PRINCIPLES AND THE PRECEDENTS OF THIS  
COURT

This Court's opinion in the Detroit case, Milliken v. Bradley, 418 U.S. 717 (1974) set forth the standards governing inter-district liability.

A review of the record below will conclusively demonstrate that the courts below were faithful to these standards, and that the requisite factual support was abundantly present in the record before them.

1. Intra-district Action Which Had  
An Inter-district Impact

The 1970 Coloma Board decision to support, though by covert means, the Eaman transfer had a clear impact on the adjacent Benton Harbor district. Immediately flowing from the Eaman transfer, which Coloma's support facilitated, was the loss to Benton Harbor of



property of significant financial value, the loss of 150 white students from a district which was already majority black and significantly blacker than any of the surrounding districts within Berrien County, and the triggering of a series of property transfers requests from other white parts of the Benton Harbor district which kept alive for years to come the hope of escape. As the district courts below found, these transfer attempts, though not consummated except for Sodus II, prevented the newly-formed program of education. For one thing, the white areas which entertained hope of escaping the black district refused to vote for necessary bond issues to support the district they hoped to leave, knowing that eventual success in their transfer efforts would be encumbered by the passage of such bond issues.

The 1974 Eau Claire decision and the 1974



Benton Harbor decision to support the Sodus II transfer petition resulted in the Intermediate District and State Board approvals which would effect this transfer. The area to be transferred from Benton Harbor would leave Benton Harbor a blacker and poorer district, and decidedly less capable of providing the requisite educational programs to its students. That this transfer was enjoined through the efforts of the Plaintiffs was not decisive on the question of liability, as both courts below found. It impacted on the question of remedy, and led the present district judge and Court of Appeals to approve a less comprehensive remedy than the Plaintiffs sought. The lower courts also took note of the Eau Claire acceptance of white students transferring from Benton Harbor on a tuition basis to it, with continuing devastating impact on Benton Harbor's racial composition.



All these actions--by Benton Harbor, by Coloma and by Eau Claire--had impacts which ineluctably flowed across the artificial lines separating the districts from each other, and each contributed to the racial segregation of the Benton Harbor schools and to the inability of the Benton Harbor schools to provide an equal educational opportunity to its students, a majority of whom were black.

## 2. Inter-district District Action, Per Se

The actions of the State Board, in approving the 1970 Eaman and the 1974 Sodus II transfer, were each explicit inter-district actions which had a racially segregative impact and intent.

The 1974 Intermediate District Board approval of the Sodus II transfer was an undeniably inter-district act, which had actual and intended segregative impacts.

The failure of the State Board to enforce



its own policy regulations and pronouncements in Berrien County, which called for denial of such racially-inspired property transfers, was an omission of intentionally segregative impact across the district lines of Benton Harbor, Eau Claire and Coloma.

3. The Remedial Actions Taken Below  
Comport With Milliken And Do Not  
Violate Columbus or Dayton

The remedial actions of the courts below were carefully tailored not to exceed the scope of the adjudicated violation, and were taken after all parties had a fair and full opportunity to be heard.

As Plaintiffs argued in the district and circuit courts, the more effective remedy would have been one which either consolidated or equally included all three districts in inter-district student and staff reassignments. The courts below, out of an abundance of caution, adopted a much more severely



limited remedial plan. The plan left all three districts intact, did not require the two offending white districts to have their students reassigned, and limited the student desegregation to such as would result from parental or student choices between the districts, while reassigning students within the Benton Harbor district itself. While we still contend that such a remedy is not the most effective response to the scope of the adjudicated violations, there can be little question that these courts did not exceed the scope of their permissible authority and discretion in ordering such a limited plan into effect. The remedial order also required that the two racially-inspired property transfers be rescinded and permanently enjoined, and that racially segregative student tuition transfers be prohibited. All of these actions were based on solid record evidence, and fall



well within this court's remedial guidelines, as set forth in Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971), Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), and Milliken I, op. cit. The scope of the remedy does not exceed, and is arguably less than, the scope of the violations.

The remedial plan is also faithful to the holdings of this Court in both Dayton v. Brinkman, 443 U.S. 526 (1979) and Columbus v. Penick, 443 U.S. 449 (1979). In each of these cases, the Court emphasizes the remedial guidelines of Swann and Keyes, but within the reaffirmed context of the earlier admonition that the "condition which offends the Constitution" must be extirpated "root and branch," See, Green v. New Kent County Board, 391 U.S. 430 (1968), and that the remedy must be one which "promises realistically to work...now," as required by Davis v. Mobile, 402 U.S. 33 (1971) and Alexander v. Holmes, 396 U.S. 19



(1969).

The remedial plan, though it has an area-wide reach, does not go beyond the parameters of the adjudicated violation. All the adjudicated defendants are required to participate in the remedy, Benton Harbor more heavily than anyone else, Coloma and Eau Claire next most heavily, and the county and state defendants least heavily. This scaled plan recognizes that, while all of these parties engaged in culpable behavior violative of the 14th Amendment rights of the black and white school children, their conduct was not the same, nor did the similar conduct have the same consequences and impacts.

Coloma's invitation to this Court to engage in an exercise to determine the "incremental segregative effect" of the adjudicated conduct is asking the proverbial "angels on the head of pin" question. The



simple answer is that the courts below found, on solid record evidence, that the conduct of these defendants went well beyond the numerical impact of the 150 white students involved in the Eaman transfer or the 200+ students involved in the Sodus II transfer. The courts found that the racially segregative and educationally adverse impact these actions had on the Benton Harbor district was system-wide, that the conduct had thorough-going impact within each of the adjacent districts, that no less extensive remedy held out any hope of extirpating the full reach of the violations, and that the children were entitled to immediate remedial relief. The fact that it has taken from 1967, when this action was initially filed, until now to even approach finality of 14th Amendment entitlements also argues against the relief these Petitioners seek.



The Coloma decision to stand mute in 1970 when the Eaman transfer was being processed stands in stark contrast to its previous behavior on other occasions when it really did oppose a property transfer. This conduct is precisely that kind of departure from previous substantive and procedural behavior which this court found, in Arlington Hts. v. MHDC, 429 U.S. 252 (1977), indicative of racial intent.

The permanent injunction which the courts below directed at the state officials, prohibiting them from granting similarly racist property transfers or permitting similarly segregative student tuition transfers, comports with the district court orders this Court approved against a federal agency in Hills v. Gautreaux, 485 U.S. 284 (1976).



### CONCLUSION

There is nothing about the remedial plan or liability findings below which warrants review by this Court. No new factual or legal ground was plowed, no new procedural techniques were employed. This is simply a case of local, country and state officials being caught red-handed in unconstitutional conduct, and being subjected to time-proven desegregative remedies designed to restore the victims of the violative conduct to the position they would have occupied, but for the violations.

For all the reasons stated above, this Court should deny both the Coloma and Fellner Petitions for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael H. Sussman, certify that on the 6th day of September, 1983, I served three (3) copies of the attached Opposition to Writs of Certiorari to the United States Supreme Court by having them sent, first class mail, postage fully prepaid, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, to each of the following named attorneys of record:

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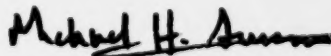
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---

Michael H. Sussman



In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

Coloma Bd. of Ed., et al.,  
Petitioners,  
v.

Barbara Jean Berry, et al.,  
Respondents.

Zelma Fellner, et al.,  
Cross-Petitioners,  
v.

Barbara Jean Berry, et al.,  
Respondents.

CONSOLIDATED OPPOSITION OF THE SCHOOL  
DISTRICT OF THE CITY OF BENTON HARBOR,  
THE BENTON HARBOR AREA SCHOOL DISTRICT,  
MEMBERS OF THE BENTON HARBOR AREA  
SCHOOL BOARD, and SUPERINTENDENT OF  
THE BENTON HARBOR AREA SCHOOL DISTRICT,  
RESPONDENTS, TO PETITIONS FOR CERTIORARI  
OF FELLNER AND COLOMA BOARD OF EDUCATION

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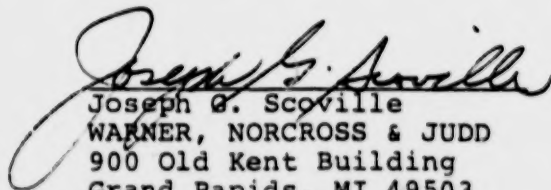
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Respondents School District of The City of Benton Harbor, The Benton Harbor Area School District, Members of The Benton Harbor Area School Board, and Superintendent of The Benton Harbor Area School District, join with Respondents Barbara Jean Berry in consolidated opposition to the Petitions For Certiorari of Fellner and Coloma Board of Education and adopt the Statement of Issues, Factual Statement, Statement of Proceedings Below and Argument contained in the Consolidated Opposition brief filed by Respondents Berry, dated September 6, 1983.

Dated: 9/15/83

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I, Joseph G. Scoville, certify that on the 15th day of September, 1983, I served three (3) copies of the attached Consolidated Opposition of The School District of The City of Benton Harbor, The Benton Harbor Area School District, Members of The Benton Harbor Area School Board, and the Superintendent of The Benton Harbor Area School District, Respondents, To Petitions For Certiorari of Fellner and Coloma Board of Education upon the United States Supreme Court by having them sent, first class mail, postage fully prepaid, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, and to each of the following named attorneys of record:



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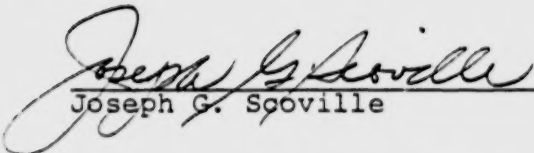
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OCT 2 1983

ALEXANDER L. STEVAD,  
CLERK

No. 83-254

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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ZELMA FELLNER, *et al.*,  
*Cross-Petitioners,*

v.

BARBARA JEAN BERRY, *et al.*,  
*Respondents.*

---

**REPLY BRIEF OF CROSS-PETITIONERS  
FELLNER, ET AL., TO CONSOLIDATED  
OPPOSITION OF BARBARA JEAN BERRY,  
RESPONDENTS, TO PETITIONS FOR  
CERTIORARI OF FELLNER AND COLOMA  
BOARD OF EDUCATION**

---

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THE ISSUE ON WHICH CROSS-PETITIONER  
FELLNER ASKS THIS COURT TO ACT  
IS NOT MOOT.

Respondents' brief at page 32 misstates the status of the Intervenor-Petitioners, Fellner, et al, when Respondents state "the State Board has already, with permission of the district court and before the district court concluded the remedial hearings, rescinded its earlier approval of the Sodus II transfer.... Thus, to an extent, the issue on which the intervenors wish this Court to act has been mooted by the state board's decision to rescind the approval and adopt new procedures which preclude consideration being given in the future."

Intervenor-Petitioners Fellner, et al., show that at a pre-trial conference held by the District Court on February 3, 1975, counsel for the state defendants



suggested that in order to permit the state to be released as a defendant, the state might be willing to cause the state board of education to rehear and rescind the Sodus II transfer.

At a pre-trial conference held on July 7, 1975, counsel for the state defendants suggested that the state would be willing to stipulate to a permanent order against the Sodus II transfer as part of a settlement stipulation, the quid pro quo of which would be the dismissal of Eau Claire as a party defendant and the terminating of any further relief sought by plaintiffs against the state.

The state board of education held a rehearing on the Sodus II territory transfer petition on January 7, 1976. Thereafter, it vacated its earlier order of July 3, 1974, which had ordered the



school territory transfer on the basis of educational needs. Subsequently, an action under the Michigan Administrative Procedures Act was filed in the state circuit court by Fellner, et al. That case was thereupon removed to the United States District Court on a petition for removal of the state. The case was assigned to Judge Noel P. Fox who was the same judge then assigned to this instant case.

A motion to remand was filed by Fellner, et al. Judge Fox, on February 12, 1976, remanded the case to the state court. In his opinion Judge Fox ruled that the state court's conduct in the state action did not pose any threat to any matter which must be decided in the Berry case. Subsequently, Judge Fox held that the state "court's intervention into a case concerning solely issues of state



law is not appropriate, and the motion to remand is hereby granted."

On September 5, 1978, the state circuit court entered an order declaring null and void the rehearing proceedings of the state board leaving in tack the board's original order of July 3, 1974. This ruling of the Berrien County Circuit Court was based upon state law. The order provided that "the state defendant shall take no action on any proposal, be it of its own or any other party, until the Sodus transfer area is no longer in litigation and then only subject to the review and superintending control of this court." The state court further retained jurisdiction of the action pending disposition of this federal action.

Respondent Berry therefore misstates the present status of Intervenor-



Petitioners. Clearly, the issue on which the intervenors wish this Court to act has not been mooted by the state board's decision because the state board's recision action has been declared null and void.

The voided action of the state board of education, taken for the purpose of attempting to extricate itself and the Eau Claire School District from this federal lawsuit, cannot justify the wiping away of the rights and interests of parents of children living in the Sodus II transfer area who were properly concerned with the educational problems facing their children. Neither does the failure of the State of Michigan nor the Eau Claire School District to pursue further review of the case in this Court moot Intervenor-Petitioners' claim. What is significant is that at no time did the state board of



education reverse its findings of fact that the Sodus II transfer should be granted on the basis of stated educational concerns.

This Court's review concerning the constitutional limits of the federal judiciary as it impacts on the administration of public education at the state and local levels is necessary to prevent exactly what did occur in this case, that being the bargaining away of the proper educational judgments of parents and school districts in an attempt to buy peace from intrusive federal court action. This Court should grant Cross-Petitioners' Petition for Writ of Certiorari precisely for the reason that local and state administrative authorities should no longer be relegated to initiative-stifling roles as minions of



the courts. School boards, state and local, should be permitted to carry out their educational functions in accordance with existing state law so long as the actions of such school administrative authorities has not been racially motivated. "Federal courts no longer should encourage this deference by the appropriate authorities -- no matter how willing they may be to defer." Columbus Board of Education v. Penick, 443 U.S. 483 (1979) (Rehnquist, dissenting).

Respectfully submitted,

---

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